Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JOHN D. LANGLEY,
Petitioner-Appellant,

v.

THE ILLINOIS SECRETARY OF STATE,
ILLINOIS HUMAN RIGHTS COMMISSION, AND
ILLINOIS DEPARTMENT OF HUMAN RIGHTS,
Respondent- Appelles.

On Petition for a Writ of Certiorari to the
Appellate Court of Illinois, Fifth District

PETITION FOR WRIT OF CERTIORARI

JAMES B. WHAM
COUNSEL OF RECORD
FOR PETITIONER
WHAM AND WHAM ATTORNEYS
212 EAST BROADWAY
POST OFFICE BOX 549
CENTRALIA, ILLINOIS 62801
PHONE: (618) 532-5621
FAX: (618) 532-5055

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

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QUESTIONS PRESENTED

1. Can the State of Illinois fail or refuse to provide a forum, as required by the Due Process clause of the Fourteenth Amendment, in which the age discrimination claim of Petitioner based on violation of his Equal Protection rights under the Fourteenth Amendment be considered and determined?

2. Can and did the Illinois Legislature, in creating the Illinois Human Rights Commission, by the terms of the Act prohibit or preclude the Commission from considering Petitioner's Fourteenth Amendment Equal Protection rights in determining his claim of age discrimination against the Illinois Secretary of State under the provisions of the Illinois Human Rights Act?

3. Did the Illinois Human Rights Commission, and the Illinois Appellate Court and the Illinois Supreme Court violate the Fourteenth Amendment Due Process rights of Petitioner in refusing to hear and determine his claim that his employer, Secretary of State, violated his Fourteenth Amendment Equal Protection rights in forcing his retirement against his will in violation of the Illinois Human Rights Act age discrimination provisions?

4. Were the Fourteenth Amendment Equal Protection rights of the Petitioner violated by the Respondent, Illinois Secretary of State, in forcing his retirement against his will under a mandatory age retirement system, while at the same time permitting similarly situated Secretary of State investigators to continue serving beyond the mandatory age retirement provision applicable to them?

PARTIES TO THE PROCEEDING

PETITIONER

John D. Langley

RESPONDENTS

The Illinois Secretary of State

Illinois Human Rights Commission

Illinois Department of Human Rights

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PETITION FOR A WRIT OF CERTIORARI

John D. Langley respectfully petitions for a Writ of Certiorari to review the Judgment and Order of the Appellate Court of Illinois, Fifth District, leave to appeal having been denied by the Illinois Supreme Court.

OPINIONS BELOW

The Opinion of the Appellate Court of Illinois, Fifth District, is an unpublished Supreme Court Rule 23 Order* filed January 16, 2001. (Appendix A, A-1-8)

The Order of the Illinois Appellate Court granting Langley's Petition for Rehearing. (Appendix B, A-9)

The Order of the Appellate Court on considering the Petition for Rehearing, the Answer thereto and the Reply, denying the Motion to Publish and ordering that the Appellate Court's Supreme Court Rule 23 Order entered January 16, 2001 shall stand as the Court's decision in this case. (Appendix C, A-10)

The Order of the Illinois Supreme Court denying Petition for Leave to Appeal, October 3, 2001. (Appendix D, A-11)

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The Order and Decision of the Illinois Human Rights Commission, entered April 23, 1999. (Appendix G, A-16-28)

The Recommended Order and Decision of the Administrative Law Judge, Michael R. Robinson, entered January 16, 1998. (Appendix H, A -29-56)

The Order and Decision of the State of Illinois Human Rights Commission, *In the Matter of: Department of Human rights, et al., Complainants, and State of Illinois, Office of the Secretary of State, Respondent., Charge No: 1984 CF 9002, ALS No: 1164(L),* (Cease and Desist Order), entered August 28, 1985. (Appendix I, A-57-59)

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JURISDICTION

The Illinois Supreme Court Rule 23 Order and Judgment of the Illinois Appellate Court, Fifth District, was entered January 16, 2001. A timely Petition for Rehearing was granted on February 21, 2001. (Appendix B, A-9)

After reconsideration, the Court entered its Final Order on June 26, 2001, stating:

> "This cause has been considered on rehearing and on appellant's motion to publish; and the court having considered the petition for rehearing, answer thereto, and reply to answer and being advised in the premises:
>
> "IT IS THEREFORE ORDERED that motion to publish shall be, and the same hereby is, DENIED.
>
> "IT IS FURTHER ORDERED that this court's Supreme Court Rule 23 order entered on January

16, 2001, shall stand as the court's decision in this cause." (Appendix C, A-10)

A timely Petition for Leave to Appeal to the Illinois Supreme Court was denied without comment October 3, 2001. (Appendix D, A-11)

A timely Motion for Leave to File Motion for Reconsideration of the Supreme Court's Denial of Petition for Leave to Appeal was denied and Mandate issued to the Appellate Court on November 6, 2001. (Appendix E, A-12-13)

The Jurisdiction of this Court is invoked under 28 U.S.C., §1257(a). Also, by reason of the refusal of the Illinois Human Rights Commission and the Illinois Appellate Court, Fifth District, and the Illinois Supreme Court to provide Petitioner a Due Process hearing as required by the Due Process clause of the Fourteenth Amendment to the Constitution of the United States in which to consider and determine Petitioner's claims that his Equal Protection rights were violated by the Illinois Secretary of State contrary to the Fourteenth Amendment.

STATUTORY PROVISIONS INVOLVED

1981 Illinois Vehicle Code, Ill.Rev.Stat. 1981, ch. 95 1/2, par. 2-115. (Appendix U, A-200)

Human Rights Act, Ill.Rev.Stat. 1989, ch. 68, par. 1-101 et seq. (now 775 ILCS 5/1-101 et seq. (West 1998)) (Appendix V, A-201)

Equal Protection clause and Due Process clause of the Fourteenth Amendment to the Constitution of the United States providing:

"§1. ...No state shall deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

A.

This case involves a claim based on undisputed facts which the Illinois Human Rights Commission, the Illinois Appellate Court and the Illinois Supreme Court have refused to hear. It is a claim that the Fourteenth Amendment Equal Protection rights of Petitioner, John D. Langley, a Secretary of State investigator, have been violated by his employer, the Illinois Secretary of State, in an age discrimination case in violation of the Illinois Human Rights Act.

This case directly presents the issue of whether a state can arbitrarily and irrationally ignore a state employee's claim that his Equal Protection rights were violated by his state employer and terminate his cause of action without violating due process.

This case demonstrates the ease with which a Commission, uncontrolled by proper judicial review, can erroneously avoid decision-making involving high state officers by a simple, unsupported statement rejecting its own jurisdiction to hear the case for no legitimate reason, as is reflected from the concluding words of the Illinois Human Rights Commission's Order and Decision that it"... does not have authority to declare the Secretary's action illegal." (A-28) And ..." no one has authorized us to enforce the Equal Protection Clause of the Constitition" (A-25). This erroneous rejection of its own jurisdiction was made by the Commission while at

the same time knowingly exerting its power and authority over the Secretary of State by its Cease and Desist Order entered in the case of State Of Illinois, Secretary of State, Respondent, Charge No. 1984 CF 9002, ALS No. 1164 (L), 18 ILL. HRC REP. 51. (A-57-59)

The only way found by the Appellate Court to affirm the Commission's denial of Langley's claims against the Secretary of State was to disclaim its own jurisdiction to consider the equal protection claim of Langley and thus, erroneously ignore Langley's Equal Protection and Due Process rights contrary to this Court's consistent admonition as set forth in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, at 431; 71 L.Ed 2d 265 at 276, 277; 102 S.Ct. 1148:

> "As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged.
>
> "...To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement."

Langley is entitled to exactly that and he has thus far been denied.

The only reason given for refusing to hear the Equal Protection claims is stated by the Appellate Court's Rule 23 Order affirming the Illinois Human Rights Commission's refusal to hear and decide the claim. The Rule 23 Order at page 5 reads as follows:

> "Langley also argues that the Commission committed error by 'ignoring' the disparate treatment

of Langley as compared to certain other Secretary of State investigators. Langley claims that by forcing his retirement at age 62 while allowing other investigators to stay on the job past age 60, the Secretary of State has violated his equal protection rights,...In its order, the Commission stated that it refused to hear these claims because they were out of its jurisdiction.

"An administrative agency has only those powers specifically granted to it by the legislature...

"The Act grants the Commission authority to render decisions on complaints filed in conformity with the Act. 775 ILCS 5/8-102(G)(West 1998). The Act does not grant the Commission the power to enforce the Code or to hear constitutional claims such as a claim of the violation of equal protection rights...Therefore, we conclude that the Commission was correct in refusing to hear Langley's claims based on the enforcement of the...equal protection rights. We do not make any finding as to the validity of any of these claims but, rather, conclude that we have no jurisdiction to consider them in Langley's appeal of the order of the Commission."

Petitioner contends that the refusal to hear and consider this claim is a violation of the Due Process clause of the Fourteenth Amendment by the Commission and the Illinois Courts, as well as the violation of the Equal Protection clause by the Illinois Secretary of State.

These Federal questions have been timely raised throughout the proceedings, as is apparent from the Appellate Court's Rule 23 Order (A -1-8); the Order and Decision of the Human Rights Commission (A-16-28);

the Recommended Order and Decision of the Administrative Law Judge (A-29-56); and the Order of the Illinois Supreme Court denying Langley's Petition for Leave to Appeal (A-11), as well as the Order denying Langley's Motion to Reconsider the Denial of Petition for Leave to Appeal (A-12-13); and from the excerpts of the record and pertinent portions of the Briefs, Motions and Petitions filed by Langley throughout the proceedings, as appears in the Appendix and as referred to herein.

The undisputed facts upon which Petitioner's contentions are based are as follows:

The Petitioner, John D. Langley, began working as an investigator for the Illinois Secretary of State in November 1966. And after having been terminated in February 1971, because of his political affiliation as a Democrat, was reinstated on May 22, 1972 and thereafter continued to serve as an investigator until August 14, 1990 when he was forced against his will to retire four days after his 62nd birthday, August 10, 1990. Langley was informed by the District Commander of the Secretary of State's office that his service as investigator would end that date because Article 29 of the Collective Bargaining Agreement was being enforced against him. Article 29 reads as follows:

> "All sworn personnel holding the rank of investigator shall retire from service with the Department of Police upon reaching the age of sixty-two (62) or upon completing twenty (20) years of active duty, whichever occurs later."

At the time of his forced retirement, litigation was pending in the Illinois Supreme Court, namely, *The State of Illinois, Secretary of State, Appellee, v. Edward*

Mikusch, et al. Appellants. The case had been decided by the Appellate Court on May 5, 1989 in 181 Ill.App.3d 431, and was pending in the Supreme Court on appeal from the Appellate decision, which was not finally determined by the Supreme Court until October 4, 1990 in 138 Ill.2d 242, 562 N.E.2d 168, 149 Ill.Dec. 704, 51 days after Langley was forced to retire.

The *Mikusch case* involved the issue whether the 70 year retirement age limitation of the Human Rights Act (Ill.Rev.Stat.1981, ch. 68, par. 1-102(A), 1-103(A)(Q), 2-102(A) prevailed over the 60 year mandatory retirement age provision of the Illinois Motor Vehicle Code, Ill.Rev.Stat.1981, ch. 95 1/2, par. 2-115, for Secretary of State investigators.

At the time of Langley's forced retirement, there was also pending the companion case entitled, *State of Illinois, Secretary of State, Respondent, Charge No. 1984 CF 9002, ALS No. 1164(L), 18 Ill.HRC Rep. 51* In that case, there was still in effect on August 14, 1990 a Cease and Desist Order which had been entered by the Illinois Human Rights Commission on August 28, 1985 ordering the office of the Secretary of State to cease and desist from taking any measures to compel or coerce Secretary of State investigators to retire before they attained any age younger than 70 years. (A-57-59)

Langley was subject to and covered by that Order, as were all Secretary of State investigators, including the following ranked investigators: Lieutenant Columbus DiSabato, date of birth October 12, 1923; Major Robert Sandona, date of birth June 25, 1926; and Lieutenant Raymond Wood, date of birth January 12, 1925. These ranked investigators were not subject to the Collective Bargaining Agreement, but were subject to the manda-

tory retirement age of 60 years, which applied to them by virtue of the Motor Vehicle Code provision, heretofore referred to.

Langley was forced to retire against his will in violation of the Cease and Desist Order referred to above, while at the same time DiSabato, Sandona and Wood were permitted to serve as long as they desired until they voluntarily retired. This was disparate treatment which Langley claims violated his Equal Protection rights under the Fourteenth Amendment of the United States Constitution.

Although Langley was not specifically named in the Cease and Desist Order, he was entitled to the same protection by the Cease and Desist Order as was Robert Sandona who also was not specifically named in the Cease and Desist Order and was 64 years of age at the time of Langley's forced retirement at age 62. They both came within the clause of the Cease and Desist Order applying to "any others it (Secretary of State) may employ as investigators." (A-57-59)

The Secretary of State was, therefore, prohibited by the Cease and Desist Order to force Langley to retire against his will notwithstanding the provisions of the Collective Bargaining Agreement. The Cease and Desist Order language is definite and specific that the Secretary can take no measures to compel or coerce investigators to retire before attaining age 70 years. The fact that some investigators might wish to take advantage of the retirement provisions is irrelevant. Langley determined to keep working and was entitled to do so since he was not 70 years old.

On the date of Langley's forced retirement, the Illinois Supreme Court had not yet decided the *Mikusch* case and did not render its decision until October 4, 1990 (138 Ill.2d 242, 562 N.E.2d 168, 149 Ill.Dec. 704). Prior to that date, the Appellate Court on May 5, 1989 (181 Ill.App.3d 431) had determined that the Motor Vehicle Code mandatory retirement age of 60 was the applicable law of mandatory retirement for all Secretary of State investigators, ranked and non-ranked alike. Investigators DiSabato, Sandona and Wood were all more than 62 years of age on May 5, 1989, and the Commission's Cease and Desist Order was the only reason they could legally keep working as Secretary of State investigators.

Langley was entitled to the same protection from forced retirement by that same Cease and Desist Order, yet he was wrongfully required to retire on August 14, 1990 in violation of the Cease and Desist Order immediately upon attaining age 62, while DiSabato, Sandona and Wood, all of whom were more than 64 years of age on that date, were all allowed to continue working by the Secretary of State in accordance with the Cease and Desist Order. Thus, Langley's Equal Protection rights were violated by the disparate treatment he received from the Secretary of State based on age at the time of his discharge.

Even the Administrative Law Judge, who likewise refused to enforce the Equal Protection rights of Langley, specifically recognized in the Recommended Order and Decision that Langley:

> "...is correct that Respondent has not explained why, if the ranked officers were not forced to retire pursuant to Article 29 of the collective bargaining

> agreement, Respondent did not forcibly retire these officers pursuant to section 2-115 of the Motor Vehicle Act when they turned 60 years old." (A-53)

The Appellate Court in avoiding this clearly discriminatory treatment erroneously cites and relies on the 1987 Amendment of the Human Rights Act as a reason for affirming the Human Rights Commission's denial of Langley's claim. (A-3)

That amendment has no effect at all on Langley's Equal Protection claims as a reading of that Amendment clearly reflects:

> "Nothing contained in this Act shall prohibit an employer...from: Imposing a mandatory retirement age for firefighters or law enforcement officers if prior to December 31, 1993, the law enforcement officer or firefighter has attained the age of retirement in effect under applicable state or local law on March 3, 1983[,] and if such retirement action is taken pursuant to a bona fide retirement plan. This paragraph (G)[sic] shall not apply with respect to any cause of action arising under the Illinois Human Rights Act as in effect prior to the effective date of this amendatory Act of 1987." (Ill.Rev.Stat. 1987, ch. 68, par. 2-104(A)(7)(now see 775 ILCS 5/ 2-104(A)(7)(West 1998)). (A-3)

The Human Rights Cease and Desist Order did not "expire" when the Amendment to the Human Rights Act was passed in 1987. Otherwise, the Cease and Desist Order could not have been effective in protecting DiSabato, Sandona and Wood from being discharged under the Appellate Court decision in Mikusch, which

was still the law of Illinois on August 14, 1990, the day Langley was forced to retire.

The 1987 Amendment did not rescind the Cease and Desist Order. The Amendment only permitted, but did not require, other employers of law enforcement officers such as State Police, Deputy Sheriffs, City Policemen (who were not covered by the Human Rights Cease and Desist Order, which Order pertained only to Secretary of State investigators) to enter into agreements establishing mandatory age retirement. All of this was totally ignored by the Human Rights Commission, the Appellate Court, and the Illinois Supreme Court, in refusing to hear and determine Langley's Equal Protection rights claims.

The Human Rights Commission had the power to enforce its Cease and Desist Order against the Secretary of State. Paragraph G of the Amendment (Section 2-104) specifically provides that the Amendment shall not apply "with respect to any cause of action in effect prior to the effective date of the amendatory act of 1987." The *Mikusch* case was still pending on appeal, as was the companion case, and the Cease and Desist Order was still in effect protecting Langley from discharge on August 14, 1990 as it did DiSabato, Sandona and Wood.

The Human Rights Commission admitted in its Order and Decision that the 1987 Amendment to the Human Rights Act did not apply with respect to any cause of action arising under the Human Rights Act in effect prior to December 3, 1987. (A-20) Also, the Supreme Court in *Mikusch* made the same finding.

There was no legitimate reason why the Secretary of State did not restore Langley to his position as soon as

Langley filed his original Complaint on August 29, 1990, only 15 days after he was forced to retire, seeking restoration of his position. (A-203) No legitimate reason can be or was stated by Respondent justifying such obvious disparate treatment of Langley in violation of his Equal Protection rights. This should have been, but was not, considered by the Commission, the Appellate Court and the Illinois Supreme Court.

The Appellate Court as well as the Human Rights Commission completely ignored the Cease and Desist Order as a reading of their respective Orders reflect. This Cease and Desist Order was in effect and should have been considered as highly relevant to the Equal Protection claims of Langley.

There is no case in Illinois, or elsewhere, authorizing a mandatory age retirement requirement to be enforced against only one of the employees while the same common employer allowed all the rest of the similarly situated employees who were, likewise, under the mandatory age retirement requirement to work as long as they wanted contrary to the mandatory retirement age applicable to them.

The Appellate Court and the Commission also erroneously ignored the violation of the Equal Protection rights of Langley regarding the disparate and discriminatory treatment he received from the Secretary of State in comparison to the Secretary's favorable treatment of another non-ranked investigator, Raymond Sanchez.

The Administrative Law Judge, although again refusing to recognize and enforce Langley's Equal Protection rights, specifically held at pages 20 and 21 of the

Recommended Order and Decision:

> "...the record reflects that Sanchez would have satisfied all requirements for the forced retirement provision of Article 29 (i.e. over 62 years of age and 'creditable service date' of August 1, 1993) on August 1, 1993. ...Respondent has not explained why it did not insist that Sanchez retire at the earliest moment after having met all of the requirements for forced retirement under the terms of the 1991 collective bargaining agreement in August of 1993, while it required Complainant to retire a mere four days after Complainant had met all of the criteria for forced retirement under the 1988 collective bargaining agreement." (A-52)

If Langley had received the same treatment as did Sanchez—Langley would never have been forced to retire at age 62. This is age discrimination in violation of his Equal Protection rights beyond doubt and it was not and cannot be explained away.

The Human Rights Commission, the Appellate Court and the Illinois Supreme Court all erroneously failed to recognize and refused to hear Langley's Equal Protection claims of age discrimination. The Commission did have jurisdiction to hear these claims, and in fact, was the exclusive forum in Illinois in which such claims could be heard.

With respect to the forum for the hearing of these Equal Protection claims in age discrimination cases, the Illinois Supreme Court in the case of *Castaneda v. Illinois Human Rights Commission, et al.*, 132 Ill.2d 304, 547 N.E.2d 437, 138 Ill.Dec. 270 (Supreme Court of Illinois Nov. 22, 1989) held at pages 278 and 279 that:

> "...the legislature intended the Commission to be the exclusive vehicle for settling employment discrimination matters. (*Thakkar v. Wilson Enterprises, Inc.* (1983), 120 Ill.App.3d 878, 883, 76 Ill.Dec. 331, 458 N.E.2d 985; *Sanders v. A.J. Canfield Co.* (N.D.Ill.1986), 635 F.Supp. 85, 87; Scott, 605 F.Supp. at 1053.) All of this confirms the legislature's intent to vest the Commission with the authority and ability to decide all matters regarding civil rights violations. The case law and the statutory language positively indicate that the purpose for creating the Commission was to create an administrative agency with special expertise which would efficiently process complaints involving civil rights violations."

Also at page 272 the Court held that:

> "The procedure for redressing acts of employment discrimination by employers (see Ill.Rev.Stat.1987, ch. 68, par. 2-102(A)) is contained in articles 7 and 8 of the Illinois Human Rights Act (hereinafter the Act) (Ill.Rev.Stat.1987, ch. 68, pars. 7-101 through 8-113)."

The fact that the words "equal protection" were not specifically referred to in the Human Rights Act does not preclude the Commission from hearing such claims. To the contrary, the Commission must consider Equal Protection issues. As stated in *City of Springfield v. Carter*, 184 Ill.App.3d 1, 540 N.E.2d 536, 132 Ill.Dec. 796, Ill.App. 4 Dist. (1989) (803-805)

> "...where there is an express grant of authority there is likewise a clear and express grant of power to do all that is reasonably necessary to execute the power or perform duties specifically conferred by

> the enabling statute..." namely, "to...take such action as may be necessary to make the individual complainant whole...action which makes one whole is action which puts the claimant in the position he or she would have been in but for the discriminatory act."

Thus, the Human Rights Commission does have the inherent power and duty to enforce the Equal Protection rights of parties coming before it.

The legislature by not using the term Equal Protection did not preclude the Human Rights Commission from exercising its inherent power and duty to consider Equal Protection rights of parties anymore than did the non-specification of the Fifth Amendment by the Legislature authorize the Commission to ignore Fifth Amendment rights of a party if raised before it. These powers and duties of the Human Rights Commission are inherent in the very creation of the Commission by the legislature.

This Court's recent decision in *Kimel v. Florida Board of Regents*, 528 U.S. 62, 145 L.E.2d 522, 120 S.Ct. 631, (Jan.11, 2000) held that the state could not be sued by a state employee in the Federal Court in an age discrimination case by reason of Eleventh Amendment immunity, but as stated by this Court:

> "Our decision today does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers...State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every state of the union.* Those avenues of relief

remain available today, just as they were before this decision."

In the footnote referred to at 145 L.Ed.2d 547 is cited various statutes in the many states, including Ill.Comp.Stat., ch. 775, sec. 5/1-101 et seq. (1998), (the Illinois Human Rights Act). This decision of the United States Supreme Court clearly shows that Langley could not pursue his claim in the Federal Court under the *Kimel* ruling and that the Illinois Human Rights Commission is the correct forum.

Stevens v. Illinois Department of Transportation, 210 F.3d 732 (7th Cir. April 11, 2000) recognizes that suits against departments of state government are equivalent to suits against a state. Langley was, thus, precluded from bringing this case against the Illinois Secretary of State in the Federal Court under the holding of *Kimel*, and therefore, the Illinois Human Rights Commission is the only forum available for Langley's age discrimination case.

B.

The Federal questions sought to be reviewed, which were all determined against Petitioner, were raised in the manner as indicated in the Appendix as follows:

1. On April 24, 1997, prior to commencement of the trial before the Administrative Law Judge, Petitioner's Prehearing Memorandum was filed referring to Petitioner's claim that the treatment he received in comparison to that received by DiSabato, Sandona and Wood violated his Equal Protection rights under the Fourteenth Amendment. (A-62-66)

2. On May 27, 1997, at the hearing before the Administrative Law Judge on Petitioner's Motion for Finding

of Liability in Favor of Langley at the Close of Evidence, Petitioner presented oral argument in support of said Motion on Langley's claim that his Equal Protection rights were violated with respect to the disparate and discriminatory treatment he received compared to the treatment received by DiSabato, Sandona and Wood. (A-67-94)

3. After these positions of Langley were denied by the Administrative Law Judge in the Recommended Order and Decision (A-56), Petitioner then raised the same Federal questions in the Amended Exceptions to Recommended Order and Decision, which was filed with the Human Rights Commission March 17, 1998. (A107-113)

4. After the Human Rights Commission denied Langley's contentions and approved and adopted the Recommended Order and Decision (A-16,28), these same Federal questions were raised by Langley on review in the Appellate Court in Petitioner's Brief (A-114-126). Also, in addition, Langley raised a second Federal question, namely, violation of his right to a hearing of his Equal Protection claims by the Administrative Law Judge and the Human Rights Commission refusing to hear and consider such Equal Protection claims by holding that the Human Rights Commission had no jurisdiction to hear Equal Protection claims. (A-122-126)

5. After the Appellate Court affirmed the Human Rights Commission in its Supreme Court Rule 23 Order, Langley in his Petition for Rehearing again raised both Federal questions. (A-128-143) And upon the granting of the Petition for Rehearing (A-9) filed his Reply to Respondents-Appellees Answer to Petition for Rehear-

ing, and again, raised the two Federal questions. (A-144-163)

6. The Appellate Court after considering the Petition for Rehearing, the Answer of Respondent and Langley's Reply, denied Motion of Langley to publish and ordered that its Supreme Court Rule 23 Order entered January 16, 2001 shall stand as the Court's decision in this cause.

7. Langley then filed his Petition for Leave to Appeal to the Illinois Supreme Court and again raised both Federal questions, namely, the violation of his Equal Protection rights and the violation of his Due Process rights to a hearing of the Equal Protection claim (A-164-174), which Petition for Leave to Appeal was denied by the Illinois Supreme Court without comment. (A-11)

8. Langley then filed his Motion for Leave to File a Motion to Reconsider the Denial of the Petition for Leave to Appeal. Again, Langley raised the two Federal questions (A-175-194), which Motion was denied by Order of the Supreme Court without comment. (A-12,13)

9. Langley's claims for violation of his Equal Protection rights with respect to treatment he received in comparison to that received by Sanchez were preserved throughout the proceedings and denied on each occasion. (A-51-53,56,101-105,108,110,111,116,118-119,122-126,131-138,140,147-151,160-162,165-174,176-185,189-191,193,195-199)

ARGUMENT

REASONS FOR ALLOWANCE OF THE WRIT

I.

LANGLEY HAS BEEN ERRONEOUSLY DEPRIVED OF HIS RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO A HEARING OF HIS CLAIM THAT THE ILLINOIS SECRETARY OF STATE VIOLATED HIS EQUAL PROTECTION RIGHTS UNDER THE FOURTEENTH AMENDMENT, CONTRARY TO THE STANDARD ENFORCED BY THIS COURT

This case in its present posture stands for the proposition that the Due Process Clause of the Constitution can be disregarded by the State Courts on a selective basis in age discrimination cases of State employees against the State.

If the Rule 23 Order of the Appellate Court is allowed to stand, the State of Illinois will have provided no forum in which Langley has an adequate opportunity to raise his Federal Constitutional claims under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States for consideration by any tribunal.

The Illinois Human Rights Commission, the Appellate Court and the Illinois Supreme Court have erroneously refused to hear and decide the Federal Equal Protection questions presented for decision. Such refusal conflicts with the relevant decisions of this Court.

The Appellate Court erroneously affirmed the Human Rights Commission's improper refusal to hear and determine Petitioner's Equal Protection rights claims, and the Illinois Supreme Court has refused to permit Petitioner to appeal that erroneous decision to the Supreme Court. This is in direct conflict with the provisions of the Fourteenth Amendment.

The Human Rights Commission is the only forum in either the State of Illinois or the Federal system with the power and duty to determine age discrimination claims of State employees against their state agency employers.

This is clearly the law of Illinois as determined by the Illinois Supreme Court in the case of *Castaneda v. Illinois Human Rights Commission, et al.*, 132 Ill.2d 304, 547 N.E.2d 437, 138 Ill.Dec. 270 (Supreme Court of Illinois Nov. 22, 1989) cited and discussed at pages 14,15,23 of this Petition.

This Court's recent decision in *Kimel v. Florida Board of Regents*, 528 U.S. 62, 145 L.E.2d 522, 120 S.Ct. 631, (Jan.11, 2000) cited at pages 16,17,23 of this Petition held that the state could not be sued by a state employee in the Federal Court in an age discrimination case by reason of Eleventh Amendment immunity.

Langley is, thus, precluded from bringing this case against the Illinois Secretary of State in the Federal Court under the holding of *Kimel*, and the Illinois Human Rights Commission is the only forum available to determine his claim for violation of his Equal Protection rights in his age discrimination case against the Secretary of State.

When Equal Protection rights are breached in the field of age discrimination matters, these rights must be addressed somewhere—and that somewhere is by the Illinois Human Rights Commission, and the Commission cannot avoid its responsibility and duty by its one-liner disclaimer that, "No one has authorized us to enforce the equal protection clause of the Constitution..." (A-25)

There is no valid reason for denying a state employee the right to raise equal protection of the law questions against his state employer in age discrimination cases. To do so would violate every precept of the Fourteenth Amendment.

This Court in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 71 L.Ed 2d 265, 102 S.Ct. 1148, involved a similar circumstance growing out of the Illinois Supreme Court's disregard for the Equal Protection clause and the right to Due Process hearings under the Fourteenth Amendment.

In reversing the Illinois Supreme Court, this Court held that the decision of the Illinois Supreme Court violated the Fourteenth Amendment Due Process Clause and the Equal Protection Clause. Logan is clearly applicable to Langley. Here the Commission, the Appellate Court and the Illinois Supreme Court have each summarily rejected Langley's argument that Langley's Due Process and Equal Protection rights have been violated by the persistent failure at each level of the Illinois judicial system to provide a Due Process hearing on Langley's Equal Protection claims. This same thing happened to Logan. This Court in reversing the judgment of the Supreme Court of Illinois in Logan and remanding for further proceedings stated that, "What the Fourteenth Amendment does require, "...is an opportunity ...granted at a meaningful time and in a meaningful manner'...'for [a] hearing appropriate to the nature of the case." (Citing cases). It is such an opportunity that Logan was denied." (455 U.S. 422 at 437, 71 L.Ed.2d 265 at 279) And so was Langley. Langley and Logan were both denied the opportunity for a hearing in violation of the Due Process Clause of the Fourteenth

Amendment. They both were denied an opportunity to be heard upon their claimed Equal Protection rights.

In both *Logan* and Langley, the Courts of Illinois have ignored this Court's fundamental statement in *Boddie v. Connecticut*, 401 U.S. 371, 379, 28 L.Ed.2d 113, 120, 91 S.Ct. 780: "...a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." Langley received no opportunity at all to be heard on his Equal Protection claims.

This Court in *Logan* emphatically set forth the well-recognized rule, which was cited and quoted initially in the Statement of the Case. (Petition page 5)

It is apparent from the undisputed facts and admissions of both the Appellate Court and the Commission that Langley's Equal Protection claim under the Fourteenth Amendment was never heard by either the Administrative Law Judge, the Commission, the Appellate Court and the Illinois Supreme Court will not hear it. This vital claim for reinstatement to his position as a Secretary of State investigator, back pay, and back benefits cannot be filed in the Federal Court under the ruling of Kimel and must be heard by the Illinois Human Rights Commission under the ruling of Castaneda.

Logan was remanded by this Court for further proceedings not inconsistent with its Opinion. The same should be the case with Langley as is shown in the following Section II of this Argument.

Logan was followed by a later Illinois case, *Lott v. Governors State University*, 106 Ill.App.3d 851, 436 N.E.2d 569, 62 Ill.Dec. 543, which held at page 546 that

in a similar case to *Logan*, the "plaintiff (Lott) has a protected property interest in his employment discrimination claim and he cannot constitutionally be deprived of that interest by the inaction of the Commission." The Court in coming to that conclusion cited the *Logan* case stating that:

> "The [Logan] majority found that Logan's access to the FEPA's adjudicatory procedures was a property interest protected by the due process clause of the fourteenth amendment." [And that] "Logan was deprived of this property without due process when an administrative delay (for which Logan was not responsible) led to the dismissal of his complaint."

The same thing happened to Langley, as did to both Logan and Lott, in that the Human Rights Commission through no fault of his did not act on his Equal Protection claim, and thus, he was deprived of due process by inaction of the Commission, the Appellate Court and the Illinois Supreme Court.

Lott also stated at 546, 547 that:

> "In *Logan v. Zimmerman Brush Co.*, the Court found that 'Logan is entitled to have the Commission [FEPC] consider the merits of his charge, based on the substantiality of the available evidence, before deciding whether to terminate his claim.'(___U.S. at ___, 102 S.Ct. at 1157.) The same minimum process is due the plaintiff here. Lott is entitled to have the Department of Human Rights and the Human Rights Commission (the successors to the FEPC) consider the merits of his discrimination charge...

> "We find that the State and its agencies are 'employers' as defined in section 2-101(B)(1)(c) of the IHRA (Ill.Rev.Stat.1980 Supp., ch. 68, par. 2-101(B) (1)(c)), and that the State as an employer is capable of committing a civil rights violation, thereby subjecting itself to the procedures set out in the IHRA. The Court of Claims is not the proper forum for plaintiff's employment discrimination charge. See Ill.Rev.Stat.1980 Supp., ch. 68, par. 8-111(D)(no court has jurisdiction over alleged civil rights violations except as provided by law)."

Thus, the Human Rights Commission was the only forum having jurisdiction to determine the Equal Protection claims of employment discrimination filed by Langley.

In *Easter House v. Felder* 879 F.2d 1458 (7th Cir. 1989), the Court stated at page 1467 with reference to Logan that:

> "...the Court believed that the plaintiff was challenging an inadequate "established state procedure' that destroys his entitlement without according him proper procedural safeguards." 455 U.S. at 436, 102 S.Ct. at 1158. The Court noted that 'it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference...' 455 U.S. at 436, 102 S.Ct. at 1158."

Similarly, in Langley it was an inadequate established State procedure that destroyed his entitlement to continue working without according him proper procedural safeguards in that the Commission, the Appellate Court, and the Supreme Court of Illinois refused to accord him a Due Process hearing on his claim that his

Equal Protection rights were violated by the disparate treatment received by him from the Secretary of State.

II.

LANGLEY HAS BEEN ERRONEOUSLY DEPRIVED OF HIS RIGHTS TO EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, WHICH DEPRIVATION WAS IGNORED BY THE HUMAN RIGHTS COMMISSION, THE ILLINOIS APPELLATE COURT AND THE ILLINOIS SUPREME COURT, WHICH DEPRIVATION APPEARS FROM THE UNDISPUTED FACTS AND CONTENTIONS OF LANGLEY AS FOLLOWS:

1. The common employer, the Secretary of State, was charged with administering a mandatory age retirement system applicable to all Secretary of State investigators, both ranked and non-ranked, with fairness and impartiality as required by the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

2. There was no rational, non-arbitrary reason asserted by the Secretary of State in support of the unequal, disparate and discriminatory treatment rendered Langley in comparison to DiSabato, Sandona and Wood.

3. Another non-ranked investigator, Raymond Sanchez, also received more favorable treatment by the Secretary of State than did Langley, who was denied the same treatment for no legitimate reason.

4. The Commission, the Appellate Court and the Illinois Supreme Court all ignored the fact that neither

the Secretary of State nor anyone else made any showing or legitimate contention that this disparate treatment and discrimination against Langley "rationally furthers some legitimate, articulated state purpose" in applying the mandatory age retirement provision applicable to him, while at the same time not applying the mandatory age provision applicable to DiSabato, Sandona, Wood and Sanchez. Any attempt to justify such disparate and discriminatory treatment is nothing but an exercise of sophistry at its worst.

5. The Commission, the Appellate Court and the Illinois Supreme Court ignored the law on the issue of Equal Protection under the Fourteenth Amendment as set forth in the following cases cited by Petitioner throughout the proceedings:

In *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982) the Court held at pages 522-523:

> "Equal protection demands at a minimum that a municipality must apply its laws in a rational and nonarbitrary way. *Yick Wo v. Hopkins*,... This requires a showing that its application of the law 'rationally furthers some legitimate, articulated state purpose and therefore does not constitute invidious discrimination.' ...We have consistently applied these principles which are at the heart of the equal protection guarantee to protect against arbitrary government conduct." (Emphasis added)

In *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973), at page 618 the Court stated:

> "...The promise of equal protection of the laws is not limited to the enactment of fair and

impartial legislation, but necessarily extends to the application of these laws."

In *Northwestern University v. Evanston*, 221 Ill.App.3d 893, 582 N.E.2d 1251, 164 Ill.Dec. 307 at 310 the Court stated:

"Under principles of equal protection the classification is invalid if it is arbitrary and without a reasonable basis."

Clearly, no reasonable basis exists to treat ranked investigators more favorably in age discrimination cases from non-ranked investigators when age alone is the criteria of the mandatory age retirement system applicable to all investigators alike. There was no criteria pertaining to physical condition, job performance, or duty requirements—age was the only reason for forced retirement and that reason applied to all.

6. In the separate opinion of Justice Blackman, with whom Justice Brennen, Justice Marshall and Justice O'Connor join, it is stated that Logan also raised an Equal Protection claim, which is the same situation involved in Langley's case.

Logan states after analyzing the particular facts that, "...The Illinois scheme also deprives him of his Fourteenth Amendment right to the equal protection of the laws", and that:

"...This Court still has an obligation to view the classificatory system, in an effort to determine whether the disparate treatment accorded the affected classes is arbitrary. Rinaldi v. Yeager, 384 US, at 308, 16 L Ed 2d 577, 86 S Ct 1497 ('The Equal Protection Clause requires more of a state law than

non-discriminatory application within the class it establishes'). Cf. U.S. Railroad Retirement Bd. v. Fritz, 449 US, at 178, 66 L Ed 2d 368, 101 S Ct 453.

"...[T]he Equal Protection Clause 'imposes a requirement of some rationality in the nature of the class singled out' [And that] "The State's rationale must be something more than the exercise of a strained imagination." (455 U.S. at 442, 71 L.E.2d at 282)

There could be no more "strained imagination" than an attempt to justify the playing of favorites in the administration of a mandatory age retirement system.

There is no case in the Country authorizing a mandatory age retirement requirement to be enforced by a common employer against only one of the employees while the same common employer allows all the rest of the similarly situated employees who are likewise bound by a mandatory age retirement requirement to work as long as they desire beyond the mandatory retirement age applicable to them. No governmental officer, including the Secretary of State, should be permitted to engage in such unrestrained, bureaucratic, improper selectivity with impunity.

The treatment of Langley by the Secretary of State, the Commission and the Courts of Illinois is irrational, unconstitutional selectivity at its worst, and it should never by permitted to happen again.--but it will happen again and again in Illinois as it did in Logan and now in Langley, until the Illinois Courts acknowledge and comply with this Court's standards in enforcing, instead of ignoring, Equal Protection and Due Process Rights of the People.

CONCLUSION

Petitioner, John D. Langley, respectfully requests that this Honorable Court grant the Petition for Certiorari.

Respectfully submitted,

James B. Wham,
Counsel of Record for
Petitioner, John D. Langley

APPENDIX A

NOTICE
The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

[Filed Jan 16 2001]
NO. 5-99-0336

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

Appeal from an Order
of the Illinois Human
Rights Commission.

No. 1991 SA0096

JOHN D. LANGLEY,
Petitioner,

V.

THE ILLINOIS SECRETARY OF STATE, THE ILLINOIS HUMAN RIGHTS COMMISSION, and THE ILLINOIS DEPARTMENT OF HUMAN RIGHTS,
Respondents.

RULE 23 0RDER

The petitioner, John D. Langley, was forced to retire from his position as an investigator for the Illinois Secretary of State at age 62, pursuant to the terms of a collective bargaining agreement and the provisions of the Illinois Vehicle Code (Ill. Rev. Stat. 1989, ch. 951/2. par. 1-100 *et seq.* (now 625 ILCS 511-100 *et seq.* (West

1998))). Langley filed a complaint with the Illinois Human Rights Commission (Commission), seeking his reinstatement as an investigator, back pay, and back benefits. The Commission ruled that the Secretary of State did not discriminate against Langley on the basis of age by forcing his retirement because the retirement fell within an exception to the Illinois Human Rights Act (Act) (Ill. Rev. Stat. 1989, ch. 68, par. 1-101 *et seq.* (now 775 ILCS 511-101 *et seq.* (West 1998))). Langley appeals the order of the Commission denying his claim. We affirm.

Langley began working as an investigator for the Secretary of State in November 1966. Except for a one-year period, Langley served continuously as an investigator until August 14, 1990, when he was forced to retire at age 62. Langley was forced to retire pursuant to the terms of section 2-115 of the Illinois Vehicle Code (Ill. Rev. Stat. 1989, ch. 95 1/2, par. 2-115 (now see 625 ILCS 5/2-115 (West 1998))) and article 29 of the collective bargaining agreement between the Secretary of State and the Fraternal Order of Police. The relevant part of the collective bargaining agreement states:

"All sworn personnel holding the rank of investigator shall retire from service with the Department of Police upon reaching the age of 62 or upon completing 20 years of active duty, whichever occurs later."

The Illinois Vehicle Code provides in section 2-115, No person may be retained in service as an investigator under this Section after he has reached 60 years of age." 625 ILCS 5/2-115 (West 1998). This language was added on October 1, 1979. Ill. Rev. Stat. 1979, ch. 95 1/2, par. 2115 (as amended by Pub. Act 81-567).

Langley filed a complaint with the Commission on August 29,1990, alleging that the Secretary of State had discriminated against him based on his age, by forcing him to retire at age 62. Langley alleged that the retirement provision of the Illinois Vehicle Code is in conflict with the Act, which prevents any employer from discriminating against employees on the basis of age (Ill. Rev. Stat. 1989, ch. 68, par. 1-102 (A) (now see 775 ILCS 5/1-102 (A) (West 1998))). On December 3, 1987, section 2-104 of the Act was amended to add an exception to the prohibition against age discrimination-the following emphasized language was added:

"Nothing contained in this Act shall prohibit an employer *** from:

Imposing a mandatory retirement age for firefighters or law enforcement officers if prior to December 31, 1993, the law enforcement officer or firefighter has attained the age of retirement in effect under applicable state or local law on March 3, 1983[,] and if such retirement action is taken pursuant to a bona fide retirement plan. This paragraph (G) [sic] shall not apply with respect to any cause of action arising under the Illinois Human Rights Act as in effect prior to the effective date of this amendatory Act of 1987." (Emphasis added.) Ill. Rev. Stat. 1987, ch. 68, par. 2-104 (A) (7) (now see 775 ILCS 5/2-104 (A) (7) (West 1998)).

Since Langley was an investigator for the Secretary of State, this provision would apply to him. Since the Code was in effect on March 3, 1983, the Secretary of State argued that its section 2-115 mandatory retirement provision for law enforcement officers qualifies as an exception to the prohibition on age discrimination.

A hearing was held on Langley's complaint to the Commission on May 8, 9, and 29, 1997. The administrative law judge issued a recommended order and decision on Langley's complaint on January 16, 1998. The judge found that Langley had established a *prima facie* case of age discrimination but that the Secretary of State had shown that its actions in retiring Langley at age 62 fell within an exception to the Act. The judge found that under the Act, an employer may impose a mandatory retirement age for law enforcement officers who attain the age of retirement in effect under applicable state or local law on March 3, 1983, if that retirement action is taken pursuant to a bona fide retirement plan. The judge also found that Langley was retired under a bona fide retirement plan and that Langley was a "law enforcement officer" subject to the Illinois Vehicle Code's mandatory retirement age.

The administrative law judge further found that an employer may distinguish between classes of law enforcement officers in identifying which class of officers will be subject to a mandatory retirement plan. The judge held that Langley failed to show that the Secretary of State violated the Act in forcing his retirement. Finally, the judge found that Langley's claims that the Secretary of State had misinterpreted the collective bargaining agreement were outside the jurisdiction of the Commission and were therefore not addressed.

After Langley filed exceptions to the findings of the administrative law judge and the Secretary of State responded, the Commission issued its final order on April 23, 1999. The Commission concluded that pursuant to section 2-104 (A) of the Act; the Secretary of State may retire investigators at age 60 pursuant to the

Illinois Vehicle Code. Therefore, the Commission affirmed and adopted the recommended order of the administrative law judge. The Commission also agreed with the judge that it was not empowered to hear Langley's claims regarding the collective bargaining agreement or his equal protection claims. Langley filed a petition for review in this court on May 20, 1999.

To the extent that the Commission in this case has interpreted the meaning of the Act its findings are subject to a *de novo* review. See *Best v. Taylor Machine Works*, 179 M. 2d 367, 389 (1997). However, it is well established that courts must give substantial weight and deference to the interpretation placed on a statute by the agency charged with its administration and enforcement. *Airey v. Department of Revenue*, 116 Ill. 2d 528, 536 (1987). Such deference is appropriate because of the agency's ability to make informed judgments based on its expertise and experience. *Illinois Consolidated Telephone Co. v. Illinois Commerce Comm'n*, 95 Ill. 2d 142, 153 (1983).

In reviewing the Commission's findings, we must determine whether its interpretation of the Act is valid. The Illinois Supreme Court has stated: "The cardinal rule of interpreting statutes[] *** is to ascertain and give effect to the intent of the legislature. In determining legislative intent a court first should consider the statutory language. Moreover, a court will avoid an interpretation of a statute that would render any portion of it meaningless or void. Also, a court presumes that the legislature, in enacting a statute, did not intend absurdity, inconvenience, or injustice." *McNamee v. Federated Equipment & Supply Co.*, 181 Ill. 2d 415, 423-24 (1998). When a court ascertains the meaning of a

statute, the statute should be read as a whole and all of the relevant parts must be considered. *Cummins v. Country Mutual Insurance*, 178 Ill. 2d 474, 482 (1997).

We conclude that the plain meaning of section 2-104 of the Act is to make an exception to the Act to allow the mandatory retirement of law enforcement officers pursuant to state and local laws in effect on March 3, 1983. In this case, it is clear that, with respect to Langleys retirement the law in effect on March 3, 1983, was the Illinois Vehicle Code, which provided for the retirement of investigators at age 60. Ill. Rev. Stat. 1983, ch. 95 1/2, par. 2-115 (now 625 ILCS 5/2-115 (West 1998)). Therefore, We hold that the Commission's order stating that the retirement of investigators at age 60 does not violate the Act is proper.

Langley disputes the Commission's finding by arguing that the law in effect on March 3, 1983, was not the retirement provisions of the Illinois Vehicle Code because that provision, was invalidated by the holding of *Secretary of State v. Mikusch*, 138 Ill. 2d 242 (1990). In *Mikusch*, the supreme court upheld a ruling by the Commission in favor of certain investigators who had been involuntarily retired under the Illinois Vehicle Code. However, those investigators were retired in 1985, prior to the 1987 amendments to the Act. In fact the supreme court stated in *Mikusch* that it was addressing the Act as it existed in the early 1980's and that the 1987 amendments caused a substantive change in the law. *Mikusch*, 138 Ill. 2d at 252-53'. Therefore, we find Langley's reliance on the holding of *Mikusch* unfounded, as it does not apply to the Act as it was written at the time of Langley's retirement.

Langley also argues that the Commission committed error by "ignoring" the disparate treatment of Langley as compared to certain other Secretary of State investigators. Langley, claims that by forcing his retirement at age 62 while allowing other investigators to stay on the job past age 60, the Secretary of State has violated his equal protection rights, the provisions of the Illinois Vehicle Code, and the terms of the collective bargaining agreement with the Fraternal Order of Police. In its order, the Commission stated that it refused to hear these claims because they were out of its jurisdiction.

An administrative agency has only those powers specifically granted to it by the legislature. *Miller v. Illinois Pollution Control Board*, 267 Ill. App. 3d 160, 165 (1994). To the extent an agency acts outside its statutory authority, it acts without jurisdiction. *Siddens v. Industrial Comm'n*, 304 Ill. App. 3d 506, 510 (1999). Acts or orders of an administrative agency that are not authorized by their enabling statutes are void. *City of Springfield v. Carter*, 184 Ill. App. 3d 1, 12 (1989).

The Act grants the Commission authority to render decisions on complaints filed in conformity with the Act. 775 ILCS 5/8-102 (G) (West 1998). The Act does not grant the Commission the power to enforce the Code or to hear constitutional claims such as a claim of the violation of equal protection rights. Further, the Commission is not empowered to interpret and enforce the terms of collective bargaining agreements. See *Carver Lumber Co. v. Illinois Human Rights Comm'n*, 162 Ill. App. 3d 419, 427-3 0 (1987) (the Commission is without jurisdiction to consider a claim seeking an accommodation that violates the terms of a collective bargaining agreement). Therefore, we conclude that the Commission was correct in refusing to hear Langley's claims

based on the enforcement of the Illinois Vehicle Code, the collective bargaining agreement and equal protection rights. We do not make any finding as to the validity of any of these claims but rather, conclude that we have no jurisdiction to consider them in Langley's appeal of the order of the Commission

CONCLUSION

Based on section 2-104 of the Act, which creates an exception to the prohibition on age discrimination by allowing the forced retirement of law enforcement officials, we affirm the order of the Commission denying Langley relief under the Act.

Affirmed.

CHAPMAN, P.J., with HOPKINS and GOLDENHERSH, JJ., concurring.

APPENDIX B

[Filed Feb 21 2001]
NO. 5-99-0336

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

Petition for Review of Order of the Illinois Human Rights Commission.

No. 1991SA0096

JOHN D. LANGLEY,
Petitioner,

v.

ILLINOIS SECRETARY OF STATE, et al.,
Respondents.

ORDER

This cause has been considered on appellant's petition for rehearing; and the court being advised in the premises:

IT IS THEREFORE ORDERED that the petition for rehearing shall be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that the time for filing an answer to the petition shall extend, to and include, 21 days from the date of this order.

IT IS FURTHER ORDERED that the time for filing a reply to the answer shall extend to, and include, 14 days thereafter.

APPENDIX C

[Filed Jun 26 2001]
NO. 5-99-0336

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

JOHN D. LANGLEY,
Petitioner,

v.

ILLINOIS SECRETARY OF STATE, et al.,
Respondents.

Petition for Review of Order of the Illinois Human Rights Commission.

No. 1991 SA0096

ORDER

This cause has been considered on rehearing and on appellant's motion to publish; and the court having considered the petition for rehearing, answer thereto, and reply to answer and being advised in the premises:

IT IS THEREFORE ORDERED that motion to publish shall be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that this court's Supreme Court Rule 23 order entered on January 16, 2001, shall stand as the court's decision in this cause.

APPENDIX D

A Letter from

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

October 3, 2001

Mr. James B. Wham
Wham & Wham
212 E. Broadway
Post Office Box 549
Centralia, IL 62801

No. 91905 -John D. Langley, petitioner, v. The Illinois Secretary of State et al., respondents. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 25, 2001.

APPENDIX E

Letter from

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035

TELECOMMUNICATIONS DEVICE
FOR THE DEAF
(217) 524-8132

FIRST DISTRICT OFFICE
20TH FLOOR
160 NO. LASALLE ST.
CHICAGO 60601
(312) 793-1332

TELECOMMUNICATIONS DEVICE
FOR THE DEAF
(312) 793-1333

Mr. James B. Wham
Wham & Wham
212 E. Broadway
Post Office Box 549
Centralia, IL 62801

November 6, 2001

In re: John D. Langley, petitioner, v. The Illinois Secretary of State et al., respondents.
No. 91905

Today the following order was entered in the captioned case:

Motion by petitioner for leave to file a motion for reconsideration of the order denying petition for leave to appeal. Motion Denied.

Order entered by the Court.

Mandate issued forthwith to the Appellate Court.

Very truly yours,

s/Juleann Hornyak

Clerk of the Supreme Court

cc: Ms. Karen J. Dimond

APPENDIX F

[Filed Nov 28 2001]
NO. 5-99-0336

IN THE
APPELLATE COURT OF ILLINOIS
FOR THE FIFTH DISTRICT

JOHN D. LANGLEY,
Petitioner-Appellant,

VS.

THE ILLINOIS SECRETARY OF STATE, ILLINOIS HUMAN RIGHTS COMMISSION, and ILLINOIS DEPARTMENT OF HUMAN RIGHTS,
Respondents-Appellees.

APPEAL FROM ORDER AND DECISION STATE OF ILLINOIS HUMAN RIGHTS COMMISSION,

ENTERED APRIL 23, 1999

THREE JUDGE COMMISSION

CHARGE NO: 1991SA 0096
EEOC NO: 21B903376
ALS NO: S-5288

ON APPEAL FROM ORDER ENTERED JANUARY 16, 1999 BY PRESIDING ADMINISTRATIVE LAW JUDGE, HON. MICHAEL R. ROBINSON

ORDER

THIS MATTER COMING ON to be heard on Petitioner-Appellant's Motion to Recall Mandate of the Appellate Court and Stay Issuance Thereof Pursuant to Supreme Court Rule 368 (c) and the Court being advised in the premises, the Motion is hereby:

GRANTED
PER CURIAM

DATED:

DENIED

APPENDIX G

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

CHARGE NO: 1991SA0096
EEOC NO: 21B903376
ALS NO: 5288 (S)

IN THE MATTER OF:
JOHN D. LANGLEY,
Complainant,

AND

ILLINOIS SECRETARY OF STATE,
Respondent.

ORDER AND DECISION

This matter comes before the Commission panel pursuant to the Recommended Order and Decision submitted by Administrative Law Judge Michael R. Robinson. Ile complainant alleged that the respondent forced him to retire because of his age in violation of Section 2-102 of the Human Rights Act. After a public hearing, the Administrative Law Judge found that although the respondent did, in fact, force the complainant to retire because of his age, the respondent's actions were exempt pursuant to what is now codified as Section 2-104(7) of the Human Rights Act.[1] The complainant

[1]Although the Administrative Law Judge sometimes refers to subsection (A) (8) of Section 2104, it is clear from the timing of the complainant's termination that the Administrative Law Judge is relying on subsection (A) (7) of Section 2-104.

filed exceptions to the recommended order, which were substantially larger than the 30 pages allowed under Section 5300.920 of the Commission's procedural rules. 53 Ill. Admin. Code § 5300.920. The Commission granted the complainant leave to file amended exceptions running not more than 30 pages. The complainant complied with the Commission's order, and the respondent filed a response. The complainant attempted to file a reply, but this pleading was stricken because a reply to a response to exceptions is not provided for under our Act. Both sides have had the opportunity to present oral argument, and, accordingly, the case is now ready for decision.

BACKGROUND FACTS

Although the law in this case may be somewhat complicated, the background facts are not. The complainant, John D. Langley (Langley), was hired by the respondent, the Illinois Secretary of State (the Secretary), on November 1, 1966 as a probationary investigator. He became a full-fledged investigator in May of 1966. Langley and all other investigators were considered to be sworn police officers with the power of arrest. It is uncontested that a Secretary of State investigator is a law enforcement officer within the meaning of the Human Rights Act.

Although Langley was terminated from his position in February of 1971, he was reinstated by the Secretary on May 22, 1972.

In 1979, the Illinois Vehicle Code was amended to provide that no person could be retained by the Secretary after he had reached age 60. *See*, 625 ILCS 5/2-115, *formerly*, Ill. Rev. Stat. 1991, ch. 951/2, par. 2-115.

On September 8, 1986, the Secretary and Langley's union entered into a collective bargaining agreement which was effective retroactive to July 1, 1986. Article 29 of that agreement provided that all sworn personnel holding the rank of investigator had to retire upon reaching the age of 62, or after 20 years of service, whichever came last. Langley's 62nd birthday was on August 14, 1990. At that point he had 23 years, 10 months and 14 days of active duty. Pursuant to the provisions of the collective bargaining agreement, Langley was forced to resign, but the Secretary changed the effective date to August 16, 1990 in order to allow Langley to take advantage of certain insurance coverage.

LEGAL BACKGROUND

The Illinois Human Rights Act became effective on July 1, 1980. At that time, the word "age" was defined to include individuals who were at least 40, but not yet 70 years old. Effective September 23, 1987, Public Act 85-748 removed the upper age limit for protection under the Human Rights Act. In other words, prior to September 23, 1997, it was legal to discriminate against individuals who were over 70 years of age.

The age discrimination provisions of the Illinois Human Rights Act were in conflict with several preexisting provisions of Illinois law. Traditionally, Illinois law demanded that municipalities refuse to hire applicants over a certain age and mandatorily retire law enforcement officers when they reached mandatory retirement age. As noted, Section 2-115 of the Illinois Vehicle Code was amended to provide for a maximum age for Secretary of State investigators of 60.

After the passage of the Human Rights Act, Secretary of State investigators who had been mandatorily retired under the Illinois Vehicle Code began filing charges of age discrimination. The Human Rights Commission consolidated these cases and found that the Human Rights Act and the Illinois Vehicle Code were in irreconcilable conflict over the Secretary's duty with respect to investigators who had reached their 60th birthdays. On the one hand, the Illinois Vehicle Code required the Secretary to retire the investigators, but on the other hand, the Human Rights Act prohibited the Secretary from considering the investigators' ages when making termination decisions. We found that the Human Rights Act provisions should prevail. *Mikusch and Illinois Office of the Secretary of State*, 17 Ill.. HRC Rep. 241 (1985). Eventually, the Commission's position was upheld by the Illinois Supreme Court. *State v. Mikusch*, 138 Ill.2d 242, 562 N.E.2d 168 (1990).

The Illinois Supreme Court decision did not, however, represent the last word on the subject. After the Commission's decision in the *Mikusch* case, legislation was introduced into the General Assembly to provide that imposing a mandatory retirement age for law - enforcement officers was not a violation of the Human Rights Act if the action was taken pursuant to applicable state or local law in effect on March 3, 1983. Public Act 85-949, effective December 3, 1987. The amendment reads as follows:

> *Police and Firefighter Retirement.* Imposing a mandatory retirement age for firefighters or law enforcement officers if prior to December 31, 1993, the -law enforcement officer or firefighter has attained the age of retirement in effect under applicable

> state or local law on March 3, 1983 and if such retirement action is taken pursuant to a bona fide retirement plan. This paragraph (G) shall not apply with respect to any cause of action arising under the date of this amendatory Act of 1987. [December 3, 1987]

The amendment explicitly stated that it would not apply with respect to any cause of action arising under the Illinois Human Rights Act as in effect prior to December 3, 1987. Thus, the Illinois Supreme Court decision in *Mikusch*, which was issued on October 4, 1990, but which dealt with charges filed in the early 80's, did not state the law in effect on the date it was issued.

In fact, the Illinois Supreme Court expressly stated that the amendment (P.A. 85-949) had caused a substantive change in the law. *State v. Mikkusch*, 138 Ill.2d 242, 253, 562 N.E.2d 168, 173 (1990). The Secretary had argued in the *Mikusch* case that the above quoted amendment merely clarified the law as it existed prior to the amendment's effective date. The Supreme Court unambiguously rejected that argument. *Id.*

THE COMPLAINANT'S EXCEPTIONS

With this legal background in mind, it is now possible to consider the complainant's exceptions. Langley's main argument appears to be that the Supreme Court decision in the *Mikusch* case made it clear that on March 3, 1983, the applicable state law was the Human Rights Act. Although the Illinois Vehicle Code provided for mandatory retirement at age 60, Langley argues that the *Mikusch* case made it clear that the Illinois Vehicle Code could not be enforced. Therefore, Langley argues

that the Secretary does not come within the exception because he was forcibly retired at age 62, some eight years prior to the age 70 cap in effect under the Human Rights Act as it read in 1983. We disagree.

There are many canons of statutory construction which apply to a question such as the one presented by the complainant's exception. All of them support the Secretary's position. Perhaps the most important canon is that the legislature is not presumed to have placed extra words in a statute without any purpose. *Husky v. Bd. of Managers of Condominiums Edelweiss, Inc.*, 297 Ill. App. 3d 292, 696 N.E.2d 753 (1998) [If the legislature had meant to say that the old upper limit of 70 for age discrimination remained in effect for the mandatory retirement of police and fire fighters, it could easily have done so]. In fact, the very law which took away the upper limit for age discrimination protection specifically grandfathered in compulsory retirement at age 70 for teachers who had obtained tenure and for workers under a collective bargaining agreement. Public Act 85-748.

If Langley is right, the General Assembly would not have needed to use a phrase like ". . . the age of retirement in effect under applicable state or local law . . ." The General Assembly would have known that on March 3, 1983, no law could have allowed for forced retirement before age 70.

The weight of this argument is increased by the legislative history of the bill which became P.A. 85-949 (H.B. 2164). As originally passed by the General Assembly, the exemption would have applied to any police officer who was at least 63 years old. Thus, the original intent of the legislature was clearly to change age

discrimination protection for police officers from "less than 70" to "less than 63." When the bill went to the Governor, he issued an amendatory veto. He inserted the language which refers to the law in effect on March 3, 19,83. If he had intended to reinstate the cap on protection at age 70, he could have merely substituted the number "70" for "63." The fact that he did not do so is strong evidence that he did not intend the language to void any mandatory retirement law with a maximum age under 70. The Governor's language was accepted by the General Assembly. *See, Legislative Synopsis and Digest* 1741-1742 (Legislative Reference Bureau, February 16, 1988).

Moreover, as noted previously, the Illinois Supreme Court has ruled that the exemption for police and fire fighter retirement was intended to make a substantive change in the Human Rights Act. *Mikusch, Id.* When the bill which became Public Act 85-949 was introduced into the General Assembly, the law with respect to age discrimination was the same as it had been on March 3, 1983. Thus, if Langley's argument were accepted, one would have to assume that the amendment was intended to have no effect. Yet, the Illinois Supreme Court has specifically held, in a opinion relied upon by the complainant, that the amendment did, in fact, change the law.

Finally, extrinsic aids to statutory construction make it absolutely clear what the General Assembly intended. The federal equivalent to the Illinois Human Rights Act is the Age Discrimination in Employment Act of 1967 (ADEA). Section 623 (j)(1)(A) has almost exactly the same exemption for fire fighters and law enforcement officers as the Human Rights Act, including the refer-

ence to March 3, 1983. The exemption in ADEA predates the amendment to the Human Rights Act in question. Accordingly, it is crystal clear that it was the intent of the General Assembly to put into the Human Rights Act the same exemption with respect to police and fire fighters as was in the federal age discrimination law.

This brings us to the significance of the date, March 3, 1983. Prior to March 2, 1983, most states and municipalities had laws which had maximum ages for police and fire fighters. Despite the provisions of ADEA, it was thought that these statutes and ordinances were effective because the federal law did not apply to state or local government employees performing essential govern mental services. In the case of *EEOC v. Wyoming*, 460 U.S. 226 (1983), however, the U.S. Supreme Court held that ADEA applied to decisions made by states and municipalities with respect to their police and fire fighters. The case of *EEOC v. Wyoming* was released by the U.S. Supreme Court on March 2, 1983.

Seen in this context, subpart (j)(1)(A) of Section 623 of the ADEA is a legislative attempt to reinstate the law as it existed prior to the Supreme Court decision in *EEOC v. Wyoming*. Given the fact that Congress chose March 3, 1983, it is clear beyond doubt that the purpose of the language in question was to reinstate the state or local laws which had prevailed up until the Supreme Court decision the day before.

Under this interpretation, the phrase "applicable state or local law" make sense. As noted, there were many many instances prior to March 2, 1983, where states and/or municipalities set a maximum age for police and fire fighters. It would have been a drafting nightmare to have listed each state or local law which

was "revived" by the legislation. The language in question is a simple, shorthand way of saying that if a state or local law had a mandatory retirement date which was inconsistent with *EEOC v. Wyoming*, that state or local law would be reinstated. One of those laws which was "reinstated" was the Illinois Vehicle Code.

This brings us back to the exemption provided for under Section 2-104(A)(7) of the Human Rights Act. Since the General Assembly used virtually the same language as did Congress in the ADEA, including the all-important reference to March 3, 1983 (the day after the *EEOC v. Wyoming* decision), the General Assembly must have intended to put the same exemption into the Human Rights Act as existed in the ADEA. Thus, just as Congress intended to revive all of the mandatory retirement laws which had been voided by *EEOC v. Wyoming*, the General Assembly intended to revive all of the state and local laws which had been voided by our decision in the *Mikusch* case. Given the fact that the General Assembly was attempting to make the Human Rights Act consistent with the ADEA, it is crystal clear that the "applicable state" law referred to in the exemption is the Illinois Vehicle Code, not the Human Rights Act.

With fundamental question of legislative intent disposed of, the rest of Langley's exceptions can be resolved rather quickly. First, Langley argues that Secretary violated the original cease and desist order in the *Mikusch* case. The problem with this argument is that the Supreme Court *Mikusch* decision explicitly states that there was a substantive change in the law after Mikusch filed his charge. The Human Rights Commission is a creation of the Human Rights Act. It does not have the power to enforce a cease and desist order which

is inconsistent with that Act. Accordingly, the cease and desist order expired when the law changed.

Langley next argues that the Administrative Law Judge erred when he failed to consider Langley's equal protection argument. The short answer to Langley's argument is that it is inconsistent with established law. Generally, administrative agencies are limited to the power vested in them by statute. Acts or orders of an administrative agency which are not authorized by their enabling statute are void. *City of Springfield v. Carter*, 184 Ill. App. 3d 1, 540 N.E.2d 536 (1989). No one has authorized us to enforce the equal protection clause of the Constitution, and thus Langley's argument must fail. This is not to say that there is no overlap between the protections afforded to the people of Illinois by the Constitution and the Human Rights Act. Where there is a overlap, cases construing the Constitution may aid the Commission in interpreting the Human Rights Act. The Constitution is not, however, a separate basis for decision.

Langley's next argument is similar. He points out that ranked officers were not forced to retire in accordance with the collective bargaining agreement. Although this is clearly true, it does not constitute discrimination on the basis of age. Discrimination on the basis of rank is not a covered basis under the Human Rights Act. Langley next argues that the Secretary does not come within the provisions of subsection (A) (7) because no one was forced to retire at age 60, which is the mandatory retirement age under the Illinois Vehicle Code. Although the Secretary did not provide us with a convincing explanation as to why the mandatory retirement age was not uniformly followed, the fact that the complainant was allowed to continue working two years

beyond the mandatory retirement age provided for in the Illinois Vehicle Code can hardly be considered "age discrimination.

Langley next argues that the Secretary's treatment of Raymond Sanchez (Sanchez) proves age discrimination. Judge Robinson found that when Sanchez turned 62 in the fall of 1993, he was eligible for forced retirement, but was in fact not forced to retire. Judge Robinson articulates the possibility that the Secretary's treatment of Sanchez may constitute age discrimination because Sanchez is younger than Langley. Ultimately, however, Judge Robinson finds no discriminatory intent. We reject Langley's exception for a number of reasons. First, Judge Robinson's finding of no discriminatory intent is not against the manifest weight of the evidence. Second, although Sanchez is younger than Langley, by definition, both individuals were exactly the same age when they became eligible for retirement. We are not convinced that the fact that one 62-year-old was forced to retire and another 62-year-old was allowed to continue is evidence of "age" discrimination. Third, as noted above, the Secretary's actions clearly come within the exemption decided for in subsection (A)(7). This exemption clearly *allows* discrimination on the basis of age. We fail to see how refraining from discriminating against Sanchez on the basis of his age takes the Secretary out from the protection afforded by subsection (A)(7). For all of the above reasons, this exception is denied.

Langley next excepts to the finding of the Administrative Law Judge that the Secretary's treatment of Edward Foley (Foley), a fellow investigator, does not prove age discrimination. Judge Robinson finds that it was unclear whether Foley had 20 years of service at the

time he reached age 62. This finding is not against the manifest weight of the evidence, and therefore the fact that Foley was not forced to retire at age 62 cannot prove age discrimination.

Langley next presents a number of evidentiary questions in the form of exceptions to the Recommended Order and Decision. After having reviewed the record, we find that the evidentiary rulings by the Administrative Law Judge are consistent with Illinois law, and all evidentiary exceptions are denied.

Finally, Langley excepts to the Administrative Law Judge's refusal to allow him to amend the complaint to add allegations with respect to Investigator Sanchez. As noted above, Sanchez' case was fully considered by the Administrative Law Judge. Moreover, it has now been discussed at the Commission level. The question whether Langley should have been allowed to amend his complaint to add allegations with respect to Sanchez is moot.

CONCLUSION

In sum, it is crystal clear that the General Assembly intended to reinstate the mandatory retirement provisions of the Illinois Vehicle Code when it passed subsection (A) (7) of Section 2-104 of the Human Rights Act. Thus, forcibly retiring Langley because he was over 60 was not a violation of the Human Rights Act. The Human Rights Act does not give this Commission jurisdiction to force the Secretary to treat ranked and unranked investigators in the same way; neither does our Act give us the authority to enforce the provisions of the Illinois Vehicle Code. The bottom line is that the people of the state of Illinois, as represented by the General Assembly, do not want law enforcement offic-

ers over a certain age on active duty. While individuals may debate the wisdom of this decision, the Human Rights Commission, which It a creature of the General Assembly, does not have the authority to declare the Secretary's actions illegal.

IT IS THEREFORE ORDERED:

1. that the instant complaint and the underlying charge of discrimination are dismissed with prejudice;

2. that the Recommended Order and Decision in this cause is affirmed, adopted by the Commission and incorporated by reference herein.

(Commissioner Rudolph S. Shoultz, Commissioner James Maloof, *Commissioner Clyde H. Brooks)

Human Rights Commission
s/Rudolph S. Shoultz
s/James Maloof

ENTERED: 4-23-99

APPENDIX H

*This Order and Decision is in accordance with a vote cast by Commissioner Brooks prior to the expiration of his term.

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:

JOHN D. LANGLEY,
Complainant,

and

ILLINOIS SECRETARY OF STATE,
Respondent.

CHARGE NO: 199 1 SA0096
EEOC NO: 21B903376
ALS NO: S-5288

RECOMMENDED ORDER AND DECISION

This matter is ready for a Recommended Order and Decision pursuant to the Illinois Human Rights Act (775 ILCS 5/ 1-101 et seq.). A public hearing was held before me in Springfield, Illinois on May 8, 9 and 29 , 1997. The parties have filed their posthearing briefs. Accordingly, this matter is ripe for a decision.

Contentions of the Parties

In the instant Complaint, Complainant, an investigator with Respondent, contends that he was the victim of age discrimination when, on his 62nd birthday, he was told that he was required to retire pursuant to the terms of the applicable collective bargaining agreement. Respondent, however, contends that Complainant's forced

retirement was exempted from coverage under section 2104(A)(7) of the Human Rights Act (775 ILCS 5/2-104(A)(7)) which permits the imposition of mandatory age retirement plans under certain circumstances. It alternatively contends that any alleged disparate treatment asserted by Complainant under the instant record was insufficient to establish any claim of age discrimination, and that this Commission is without jurisdiction to consider the instant Complaint to the extent that Complainant's discrimination claim rests upon an interpretation of the terms of a collective bargaining agreement.

Findings of Fact

Based upon the record in the instant matter, I make the following findings of fact:

1. On November 1, 1966, Complainant was hired by Respondent as a probationary investigator. Complainant became a fun-fledged investigator in May of 1966. As an investigator, Complainant's duties consisted of handling pick-ups on drivers licenses and license plates, dealing with bad checks and assisting dealers with notary supplies. Moreover, as an investigator, Complainant was considered to be a sworn police officer with powers of arrest, and, at all times pertinent to the instant Complaint, was also considered to be an "investigator" as that term is defined under section 2-115 of the Illinois Vehicle Code (625 ILCS 5/2-115).

2. On February 12, 197 1, Complainant was terminated from his position with Respondent. After his termination, Complainant and four other investigators filed an unspecified type of litigation, claiming that their terminations were wrongful because they were based on their political affiliation. On May 22, 1972,

Complainant and the other terminated investigators were eventually reinstated into their positions as investigators.

3. On October 1, 1979, sec. 2-115 of the Motor Vehicle Code was amended to provide that: "[n]o person may be retained in service as an investigator under this Section after he has reached 60 years of age."

4. At some point in the mid 1980s, the Fraternal Order of Police, Lodge No. 95 petitioned the Illinois State Labor Relations Board for an order directing that an appropriate class of Respondent's investigators -be permitted to vote whether it should be the bargaining agent for the investigators. At the time of the petition, all investigators, including those with a rank of investigator sergeant, investigator lieutenant, investigator captain and investigator major were eligible for membership in Lodge 95. On June 6, 1985, the Board entered an order, in Case No. S-RC-46, which granted the right to certain investigators to vote either for representation by Lodge 95 or for "no representation". The Board, however, limited the right to vote to:

> "all investigators below the rank of sergeant in the Secretary of State's Department of Police, but excluding all sergeants, lieutenants, commanders and all other employees of the Department and all supervisors, managerial employees, confidential employees and all others excluded by the Act."

5. On July 29, 1985, the Commission entered an Order and Decision in *Mikusch v. State of Illinois Office of Secretary of State*, 17 Ill. HRC Rep. 241 (1985), in favor of certain investigators of Respondent who had been involuntarily retired under section 2-115 of the Motor Vehicle Act. There, the Commission rejected the argu-

ment made by Respondent that section 2-115 of the Motor Vehicle Act, as being the more specific act, should control over the language of the Human Rights Act which, at that time, prohibited employers from discriminating against employees between 40 and 70 years of age. Significantly, it should be noted that the Human Rights Act did not contain at the time of the *Mikusch* terminations, an exemption which would permit the State to impose mandatory retirement for law enforcement officers under certain circumstances. (See, Ill. Rev. Stat. (1983), Ch. 68, par. 2-104.) In any event, the Commission in *Mikusch*, entered a cease and desist order which prevented Respondent from "disqualifying [investigators] based solely upon attaining the age of 60 years." 17 Ill. HRC Rep. at 250.

6. On September 8, 1986, Respondent and Lodge 95 entered into a collective bargaining agreement, effective July 1, 1986. Article I of the agreement, after making reference to Illinois State Labor Relations Board Case No. S-RC-46, recognized Lodge 95 as the "sole and exclusive Collective Bargaining representative for the certified employees in the job classification known as Investigator... for purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other terms and conditions or employment." As such, only non-ranked investigators were covered under the terms and provisions of the agreement. Article 29 of the agreement provided that: "All sworn personnel holding the rank of investigator shall retire from service with the Department of Police upon reaching the age of sixty-two (62) or upon completing twenty (20) years of active duty, whichever occurs later."

7. On September 9, 1987, the Commission's Order and Decision in *Mikusch* was reversed in favor of Respon-

dent by the Circuit Court of Sangamon County. However, on November 4, 1987, the Circuit Court granted a motion to reconsider its decision.

8.On December 3, 1987, section 2-104 of the Human Rights Act (In. Rev. Stat. (1987), Ch. 68, par. 2-104) was amended to add the following language:

> (A) Nothing contained in the Act shall prohibit an employer... from "(G) Police and Firefighter Retirement. Imposing a mandatory retirement age for firefighters or law enforcement officers if prior to December 31, 1993, the law enforcement officer or firefighter has attained the age of retirement in effect under applicable state or local law on March 3, 1983 and if such retirement action is taken pursuant to a bona fide retirement plan. This paragraph (G) shall not apply with respect to any cause of action arising under the Human Rights Act as in effect prior to the effective date of the amendatory Act of 1987."

9. On June 6, 1988, the Circuit Court of Sangamon County reversed itself, and affirmed the Commission's decision in *Mikusch*.

10. On October 6, 1988, Respondent and Lodge 95 entered into a collective bargaining agreement which replaced the agreement mentioned in Finding, of Fact No. 6. As with the predecessor agreement, Article 1 of the agreement made reference to Illinois State Labor Relations Board Case No. S-RC-46 and recognized Lodge 95 as the exclusive bargaining agent for Respondent's "investigators" for purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment. As such, this agreement covered the terms and conditions of only

unranked investigators. The agreement also contained in Article 29 a mandatory retirement provision calling for the retirement of investigators at 62 years of age, or upon completion of 20 years active duty whichever occurs later.

11. On May 5, 1989, the appellate court reversed the circuit court's affirmance of the Commission's Order and Decision in *Mikusch*.

12. On June 9, 1990, Complainant entered into an agreement with Respondent that changed his employment start date from May 22, 1972 (when he came back to work after his initial termination) to November 1, 1966. This agreement permitted Complainant to buy back the time lost to his eligible credible service during the period of his first termination (February 12, 1971 to May 22, 1972).

13. On August 14, 1990, Complainant had reached his 62nd birthday (as of August 10, 1990) and had 23 years, 10 months and 14 days active duty with Respondent. On that date, Complainant reported to work, but was told by his superior, Captain Price, that, pursuant to Article 29 in the collective bargaining agreement, he (Complainant) was being retired effective at the close of business, August 14, 1990. Complainant thereafter went home and retrieved all state-issued uniforms and supplies and tendered them to his superior. Complainant's retirement date was thereafter changed to August 16Y 1990, in order for him to take advantage of certain insurance coverage.

14. On October 4, 1990, the Illinois Supreme Court in *Mikusch* reversed the appellate court and affirmed the circuit court judgment finding that the forced retirement of certain investigators constituted age discrimi-

nation under the applicable Human Rights Act.

15. On September 6, 1991, section 2-104 of the Human Rights Act (Ill. Rev. Stat. (1991), Ch. 68 par. 2-104) was amended to read:

> "(A) Nothing contained in this Act shall prohibit an employer... from:
> (8) Police and Firefighter/ Paramedic Appointment. Failing or refusing to hire or to discharge any individual because of such individual's age if such action is taken with respect to the employment of an individual as a firefighter/paramedic or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law, which provides a maximum age hiring limitation or for mandatory retirement, in effect on or before March 3, 1983.... The provisions of this paragraph (8) shall remain in effect until December 31, 1993 or until similar provisions in Section 4 of the Federal Age Discrimination in Employment Act of 1967 (29 U.S. Code 623) are deleted or repealed, whichever is later."

16. At all times pertinent to the instant case, Raymond Wood was a lieutenant investigator with Respondent. As a lieutenant investigator, Wood held a supervisory position over Complainant and other investigators, and his employment relationship with Respondent was not covered by any terms of the 1986 or 1988 collective bargaining agreements mentioned in Findings of Fact Nos. 6 and 10. On August 14, 1990, Wood was 65 years old, was still employed in his position with Respondent, and was eventually permitted to retire voluntarily on December 31, 1991.

17. At all times pertinent to the instant case, Columbus DiSabato was a lieutenant investigator with Respondent. As a lieutenant investigator, DiSabato held a supervisory position over Complainant and other investigators with Respondent, and his employment relationship with Respondent was not covered by any of the terms of the 1986 and 1988 collective bargaining agreements mentioned in Findings of Fact Nos. 6 and 10. On August 14, 1990, DiSabato was 67 years old, was still employed as a lieutenant investigator, and eventually was permitted to retire voluntarily after serving over 21 years active duty with Respondent.

18. At all times pertinent to the instant case, Robert Sandona. was a major investigator with Respondent. As a major investigator, Sandona held a supervisory position over Complainant and other investigators, and his employment relationship with Respondent was not covered by any of the terms of the 1986 and 1988 collective bargaining agreements mentioned in Findings of Fact Nos. 6 and 10. On August 14, 1990, Sandona was 64 years old, was still employed as a major investigator, and was permitted to continue in his position until October 31, 1991, when he retired voluntarily after serving more than 20 years of active duty with Respondent.

19. At all times pertinent to the instant case, Edward Foley was an investigator with Respondent. As an investigator, Foley held a position similar to that of Complainant, and Foley's position, like that of Complainant, was covered under the terms of the 1986 and 1988 collective bargaining agreements mentioned in Findings of Fact Nos. 6 and 10. On August 14, 1990, Foley was 63 years old, and had approximately 19 years of "active duty" as an investigator with Respondent. At

some point between September 1991, and December 31, 199 1, Foley purchased five years of SERS (State Employees Retirement System) creditable service time as an early retirement incentive. On December 31, 1991, Foley was permitted to voluntarily retire. While at that time, Foley had been in "active duty" with Respondent for over 20 years, it is unclear immediately prior to the time he purchased the five years of credible SERS time whether Foley had 20 years of SERS time since: (1) Foley did not contribute to SERS pension plan during the six month qualifying period at the beginning of Foley's employment, and did not start accruing pension time for purposes of acquiring SERS benefits until January 1, 1972; and (2) Foley had incurred an approximate three month suspension during his tenure with Respondent which did not count toward his retirement time.

20. At all times pertinent to the instant case, Raymond Sanchez was an investigator employed by Respondent. As an investigator, Sanchez held a position similar to that of Complainant, and Sanchez' position, like that of Complainant, was covered under the terms of the collective bargaining agreements of 1986 and 1988, mentioned in Findings of Fact Nos. 6 and 10. As of August 14, 1990, Sanchez was 60 years old, was still employed as an investigator, and had over 17 "work years" with Respondent. The record is unclear, however, as to the amount of SERS time Sanchez had as of August 14, 1990 since a review of Sanchez' personnel file indicates that he had a "seniority date" of 1969 and a "credible service date" of 1993.

21. On August 20, 1995, Sanchez received a notification from Respondent indicating that he (Sanchez) would be involuntarily retired on October 15, 1995, pursuant

to Article 29 of the then existing collective bargaining agreement. The record does not contain a copy of the collective bargaining agreement pertinent to the instant notification. However, on September 7, 1995, Respondent sent another notice indicating that it would defer action on Sanchez' mandatory retirement due to the state of the law under the federal ADEA. It further stated that it reserved the right to require a mandatory retirement should there be a future change in federal law. Sanchez remained as investigator with Respondent as of the date of the public hearing.

22. At all times pertinent to the instant case, Respondent's management construed the completion of "active duty' requirement in Article 29 in the 1986 and 1988 collective bargaining agreements to mean 20 years according to the SERS pension records. The 1991 collective bargaining agreement, which took effect after the expiration of the 1988 collective bargaining agreement, contained a provision which tied the "active service" language of Article 29 to the calculation of creditable service time according to SERS records.

23. By August 10, 1990, Complainant and other investigators had taken advantage of an alternative formula for calculating retirement pension administered by SERS that was established for investigators by the legislature in 1979. This formula, which was more generous in benefits than that given to the majority of state employees, required at a minimum that investigators be at least 55 years of age and 20 years of "creditable service" in the position of investigator.

24. At the time of Complainant's forced retirement, Respondent had forced the retirement of at least four other unranked investigators from the time period of

1979 to 1980. Complainant, however, was the only investigator that was mandatorily retired under Article 29 of the 1988 collective bargaining unit. The record is silent as to whether any other investigators met the 62 years old/ 20 years active duty requirements of Article 29 during the lifetime of the 1988 collective bargaining agreement.

Conclusions of Law

1. Complainant is an "employee" as that term is defined under the Human Rights Act.

2. Respondent is an "employer" as that term is defined under the Human Rights Act and was subject to the provisions of the Human Rights Act.

3. Complainant has established a *prima facie* case of age discrimination.

4. Respondent has articulated a legitimate, non-discriminatory reason for its decision to forcibly retire Complainant.

5. The Commission is without jurisdiction to consider Complainant's discrimination claim to the extent that such claim rests on the allegation that Respondent misinterpreted the meaning of a collective bargaining agreement both as to coverage of the agreement regarding the job classification of Respondent's employees and as to the appropriate construction of the. language of the agreement's mandatory retirement provisions.

6. An employer may impose a mandatory retirement age for law enforcement officers if, prior to December 31, 1993, the law enforcement officer had attained the age of retirement in effect under applicable state or local law on March 3, 1983 and if such retirement action was

taken pursuant to a *bona fide* retirement plan. Moreover, an employer may distinguish between classes of law enforcement officers in identifying which class of law enforcement officers will be subject to a mandatory retirement retirement plan.

7. Respondent has shown by a preponderance of the evidence that Complainant was a law enforcement officer subject to the mandatory retirement provisions of section 2-115 of the Motor Vehicle Act (Ill. Rev. Stat. (1987), ch. 651/2, par. 2-115), that it had in existence at the time of Complainant's forced retirement a *bona fide* mandatory retirement plan in accordance with section 2-104 (A) (7) of the Human Rights Act (775 ILCS 5/2-104(A)(7), and that Complainant was terminated as a result of the implementation of said plan.

Determination

Complainant has failed to prove by a preponderance of the evidence that Respondent violated section 2-102 of the Human Rights Act (775 ILCS 5/2-102) when it forcibly retired Complainant from his position as an investigator. Conversely, Respondent has shown that Complainant's forced retirement was outside the coverage of the Human Rights Act due to the exemption provided to employers under section 2-104(A)(7) of the Human Rights Act (775 ILCS 5/2-104(A)(7).

Discussion

This case presents an interesting question regarding the interplay between the mandatory retirement exemption set forth under the Human Rights Act (775 ILCS 5/2-104(A)(7)), and Respondent's application of a mandatory retirement provision in a collective bargain-

ing agreement. Curiously, Complainant does not quarrel with the right of Respondent to establish a mandatory retirement system for its investigators. Indeed, Complainant conceded at the public hearing that he would have no cause of action if Respondent had applied a mandatory retirement system as to all of its ranked and unranked investigators. (See, for example, Tr. Vol. I pp. 11- 12.) However, for reasons to be explained below, I find that the Commission does not have jurisdiction to consider certain of Complainant's arguments in support of his claim of discrimination, that Respondent may use the exemption provided in section 2-104(A)(7) of the Act to excuse its forced retirement of Complainant, and that, in any event, any disparity in treatment given to Complainant and other alleged comparables does not establish discrimination based upon Complainant's age.

In order to understand why Complainant loses under the circumstances of the instant case, it is necessary to review case law concerning the standards of proof applicable to the claims made before the Commission. Normally, in a case alleging discrimination based upon age, the Commission and the courts have applied a three-step analysis to determine whether there has been a violation of the Illinois Human Rights Act. (See, for example, *Clyde v. Human Rights Commission*, 206 Ill. App.3d 283, 546 N.E.2d 265, 151 Ill. Dec. 288 (4th Dist. 1991), and *Orlet and Jefferson Smurfit Corporation d/b/a Alton Packaging Corporation*, 40 Ill. HRC Rep. 363 (1988).) Under this approach, the complainant must first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. Then, the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for its action taken against the complainant. If the respondent is successful

in its articulation, the presumption of unlawful discrimination is no longer present in the case (see, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (198 1)), and the complainant is required to prove by a preponderance of the evidence that the respondent's articulated, nondiscriminatory reason is a pretext for unlawful discrimination. This latter requirement merges with the complainant's ultimate burden of proving that the respondent discriminated unlawfully against the complainant.

As with any case of alleged unequal treatment based upon age, the elements of a *prima facie* case will vary according to the specific claim. Generally, in establishing a *prima facie* case of age discrimination under the Act, a complainant must show that: (1) he was in the protected age classification; (2) he experienced an adverse act; and (3) others younger than the complainant were treated more favorably. (See, for example, *Clyde*.)[1]

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[1]The appellate court in *Clyde* added "adequate job performance" as an additional element of a prima facie case of age discrimination. However, more recently, the Appellate Court, First District, Third Division, in *ISS International Service System, Inc. v. The Illinois Human Rights Comm'n*, 272 Ill. App-3d 969, 652 N.E.2d 592, 209 Ill. Dec. 414, concluded that it was no longer necessary that a discharged complainant show either that he was performing satisfactorily at the time of discharge or that he was replaced by a member outside of the protected classification in order to establish a prima facie case of discrimination. See, also, the Commission's decision in *Battieste and C.E. Niehoff* __ Ill. HRC Rep. _, (1989CF4075, November 14, 1995), which approved the reasoning set forth by the *ISS* court.

Here, I find that Complainant has stated a sufficient *prima facie* case of age discrimination since the record shows that Complainant was within the protected age classification, he experienced an adverse act, and other investigators younger than Complainant, (i.e. both Sanchez and all other younger investigators who were not subject to the alleged mandatory retirement plan) were permitted to work as investigators after Complainant was forced to mandatorily retire in August of 1990.

Respondent, though, has taken the stance that Complainant has not established a *prima facie* case of age discrimination under the Act since Complainant was subject to a valid mandatory retirement plan that was exempted from the Act under section 2-104(A)(7). However, the fact that enforcement of Respondent's retirement plan may or may not exempt Respondent from the provisions of the Act does not detract from a finding that Complainant has established a *prima facie* case of age discrimination. Indeed, the fact that the legislature has created an exemption under the Act lends itself to a finding that Complainant has established a *prima facie* case of age discrimination since there would be no need for establishing an exemption if the subject conduct were not otherwise considered to be actionable under the Act.[2] Here, it is sufficient to say that Complainant established a *prima facie* case of age discrimination when Captain Price told Complainant on Complainant's

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[2] Moreover, in a case cited by Respondent (*Gonsalves v. Caterpillar Tractor Co., Inc.*, 634 F.2d 1065, 1068 (7th Cir. 1980)), the court observed that in retirements under a mandatory retirement plan, age is the relevant factor used to determine when an employee must retire.

62nd birthday that, due to the terms of the mandatory retirement provisions of the collective bargaining agreement, Complainant would no longer be able to work for Respondent.

Ordinarily, after Complainant has established a *prima facie* case of discrimination, Respondent is required to "articulate" a reason for its adverse decision against Complainant. Moreover, under the standards used by the courts and the Commission, Respondent need not "prove" by a preponderance of the evidence the truth of the articulation proffered by Respondent. (See, for example, *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2747 (1993), and *Fitzgerald and State of Illinois, Dep't of Public Aid*, _ Ill. HRC Rep. _ (1993SA0460, November 7, 1997).) However, Respondent has invoked the mandatory retirement exception found in section 2-104(A)(7) of the Human Rights Act, as well as the language of a collective bargaining agreement, as an explanation for what it did to Complainant on August 10, 1990. Thus, the normal standards requiring Complainant to bear the burden of proof to establish pretext once Respondent has articulated a reason for its adverse decision against Complainant do not apply here since, as noted by the Commission in *Cafagna v. Village of Chicago Ridge*, Ill. HRC Rep. _ (1988CF0023, April 4, 199 1), Respondent bears the burden of proof in establishing an exemption under the Human Rights Act. *Gafagna*, at p. 6.

In this instant matter, Respondent notes that under section 2-104(A)(7), law enforcement officers such as Complainant could be mandatorily retired if. (1) prior to December 31, 1993, the law enforcement officer has attained the age of retirement "in effect under applicable state or local law on March 3, 1983, [] if such retirement action is taken pursuant to a *bona fide*

retirement plan"; (2) the "applicable state law" in effect on March 3, 1983 was section 2-115 of the Illinois Vehicle Code (Ill. Rev. Stat. 1983, ch. 95 1/2, par. 2-115) which provided that "no person may be retained in service as an investigator ... after he has reached 60 years of age"; (3) the collective bargaining agreement in effect at the time of Complainant's forced retirement required unranked investigators such as Complainant to retire at age 62; and (4) the retirement plan at issue (i.e., the Sate employees retirement system alternative formula) was "*bona fide*" because it provided substantial benefits to Complainant and others involuntarily retired. See, for example, *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984)

Complainant raises several arguments contesting the availability of section 2-104(A)(7) to the instant case. Initially, Complainant contends that, under *State of Illinois, Secretary of State v. Mikusch*, 138 Ill.2d 242 (October 4, 1990), the Illinois Supreme Court held that Respondent could not rely on section 2-115 to involuntarily retire investigators at the age of 60 since: (1) the language Human Rights Act at that time prohibited age discrimination for employees aged between 40 and 70 years of age; (2) the Human Rights Act did not contain an exemption permitting the involuntary retirement for law enforcement officers; and (3) section, 2-115 of the Motor Vehicle Code did not provide an exception to the Human Rights Act. Accordingly, Complainant contends that his involuntary retirement at age 62 was unlawful since, under *Mikusch*, the applicable retirement age for investigators was the 70 year limit found in the Human Rights Act. Complainant's arguments, however, do not persuade.

Specifically, it should be noted that the terminations at issue in *Mikusch* were accomplished at a time when the Human Rights Act did not contain the exemption for mandatory retirements found in section 2-104(A)(7). Moreover, the Illinois Supreme Court expressly noted that the amendment to the Act which included for the first time the language presently found in section 2-104(A)(7) did not apply to the terminations at issue in *Mikusch*. Thus, while Complainant wishes to bind Respondent to the holding in *Mikusch* which essentially "repealed" section 2-115 with respect to involuntary terminations of Respondent's investigators, it can be argued that the holding in *Mikusch* does not apply to the instant case since Complainant's termination occurred at a time when section 2-104(A)(7) was a part of the Human Rights Act.

Complainant's related argument with respect to the *Mikusch* decision is more intriguing. Distilled to its essence, Complainant's argument focuses on the language of section 2-104, which Emits the applicability of the exemption to law enforcement officers who have attained the age of retirement "in effect under applicable state or local law on March 3, 1983". Thus, according to Complainant, Respondent cannot rely on section 2-104(A)(7) to excuse what would otherwise be unlawful age discrimination since the *Mikusch* court declared that, at least prior to the 1987 amendment to the Human Rights Act (and presumably on March 3, 1983), section 2-115 of the Motor Vehicle Act did not apply to Respondent's unranked investigators.

Complainant's argument is without merit for several reasons. Initially, it should be noted that the Illinois Supreme Court in *Mikusch* did not hand down its

decision until October of 1990, and the Commission did not give the parties any clue that there could be something wrong with the applicability of section 2-115 until it entered its Order and Decision in *Mikusch* in July of 1985. Thus, if the language in section 2-104(A)(7) is to be viewed literally, section 2-115 did "apply" to involuntary retirements of Respondent's investigators on March 3, 1983 since there had been no judicial or agency pronouncement to the contrary as of that date.

Too, while Complainant expends great energy on his observation that "ignorance of the law" is no excuse for this Respondent in relying on its perception of the state of the law at the time of Complainant's involuntary retirement, it should be noted that as of the August 10, 1990 termination of Complainant, the "last word" on whether section 2-115 of the Motor Vehicle Code permitted Respondent to involuntarily retire its investigators was contained in the Appellate Court decision in *Mikusch* which told Respondent that involuntary retirements under section 2-115 of the Motor Vehicle Code were proper. Hence, Complainant's desire to find Respondent liable under the Human Rights Act based upon language set forth in the Illinois Supreme Court's decision in *Mikusch* is problematic where the decision had not been in existence at the time of Complainant's termination.[3]

Other factors also lead to a determination that the mandatory retirement provisions of section 2-115 of the

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[3]Indeed, due to the differing opinions registered by the various courts which considered the mandatory retirement provisions of section 2-115 of the Motor Vehicle Act as applied to investigators, it is difficult to fault Respondent for taking the position it did in August of 1990 with respect to Complainant.

Motor Vehicle Act were "in effect" as of March 3, 1983 for purposes of applying the exemption contained in sec. 2-104(A)(7) of the Human Rights Act. Specifically, as noted by the court in *McCann v. City of Chicago*, 968 F.2d 635 (71 Cir. 1992), the 1987 amendment to the Human Rights Act, which first included section 2-104(A)(7) as an exemption to the Act, would be hollow if the rules in force in 1983 forbade mandatory retirement earlier than the limit of 70 years already established by the Human Rights Act. (968 F.2d at 637.)[4] Here, Complainant has no real answer to the reasoning used by the Seventh Circuit in *McCann* which, as noted in its decision, was in a position to resolve what effect, if any, *Mikusch* had on involuntary retirements occurring after the enactment of section 2-104(A)(7).

Additionally, Complainant, in invoking notions of equal protection, challenges the ability of Respondent to involuntarily retire him while permitting others to remain with Respondent after their 62nd birthday and after their 20th year of service with Respondent. Specifically, Complainant insists that if Respondent is to have an involuntary retirement policy for its investigators, it must apply such policy to all investigators

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[4] Moreover, while the *Mikusch* case concerned only a conflict between section 2115 of the Motor Vehicle Code and the anti-age discrimination provisions of the Act, the rationale behind the *Mikusch* decision, i.e. that the Human Rights Act must prevail over the Motor Vehicle Code provision because the Human Rights Act is more specific on the issue of age discrimination, would theoretically place all state and local enactments providing for mandatory retirement as of March 3, 1983 in jeopardy. Thus, taking Complainant's argument to its logical conclusion, none of the various state and local laws providing for mandatory retirements would have been "in effect" as of March 3, 1983 due to the conflicting age provisions of the Human Rights Act.

regardless of rank. Case law, however, does not support Complainant's argument in this issue.

Initially, to the extent that Complainant rests his claim on the federal equal protection clause, I agree with Respondent that the Commission is the wrong forum to address such claims since the Commission can only interpret the Human Rights Act. Moreover, while Complainant contends that "no court in the land ... can ignore equal protection" when it comes to issues of age discrimination (see Complainant's brief at p. 31), I would note that the United State Supreme Court, on at least three different occasions, has determined that age discrimination is constitutionally permissible. (See, *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed. 2d 410 (199 1); *Vance v. Bradley* , 440 U.S. 93, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979); and *Massachusetts Board of Retirement v. Murgia* 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).)[5] Indeed the organizational posture in which the *McCann* court considered and rejected the claim that the City of Chicago could not have two different retirement ages for its ranked and unranked police officers should put to rest Complainant's equal protection claim that Respondent could not have two different retirement schemes for its ranked and unranked investigators.

To be sure, though, Complainant is correct that, even though the Commission may not cite the equal protec-

[5]Indeed, the court in *Quinones v. City of Evanston, Ill.*, 58 F.3d 275, 280 (7th Cir. 1995) suggested that an employee's only federal relief with respect to age discrimination lies with the ADEA rather than any constitutional protection since an employee could not use a section 1983 petition (42 U.S.C. § 1983), which provides the only avenue to raise rights guaranteed by the Constitution, to raise an age discrimination claim.

tion clause, the Commission has always considered disparate treatment among similarly situated employees in order to determine whether there has been any violation of the Human Rights Act. (See, for example, *Loyola University v. Human Rights Com'n.*, 149 Ill. App.3d 8, 500 N.E.2d 639, 102 Ill. Dec. 746, (1st Dist., 3d Div., 1986).) However, three of the five investigators Complainant cites as comparables (i.e., DiSabato, Sandona and Wood) are "ranked" investigators, and thus arguably disqualify them from being suitable comparatives. More important, though, is the fact that four of the five comparable investigators cited by Complainant (DiSabato, Sandona, Wood and Foley) who were permitted to retire on their own time-tables after achieving the age of 62, were older than Complainant. Hence, even if notions of the court's decision in *Loyola* come into play in the resolution of the instant case, Complainant has failed to cite any authority (persuasive or otherwise) for the proposition that Respondent is guilty. of age discrimination when it treats individuals older than Complainant in a more favorable fashion.

The circumstance of Sanchez, though, is problematic for Respondent since unlike DiSabato, Sandona and Wood, Sanchez was an unranked investigator who, at age 60, was younger than Complainant at the time of Complainant's termination and was permitted to remain on staff past his 62nd birthday in the Fall of 1993, after having served the minimum of 20 years as an investigator. Initially, Respondent contends that Sanchez is not a suitable comparative for purposes of establishing age discrimination since: (1) Sanchez neither had the required 20 years of service or minimum age for retirement until at least two years after Complainant's August 10, 1990 termination; (2) at the

time Sanchez acquired the requisite age and number of years of creditable service, a different collective bargaining agreement was in effect; and (3) Sanchez' continued employment after December 31, 1993 can be explained by the fact that the exemption provided by the Human Rights Act for mandatory retirements expired on December 3 1, 1993.

These attempts by Respondent to distance Sanchez from the circumstances associated with Complainant, however, do not persuade. Specifically, while it is true that in the Fall of 1993 the terms of mandatory retirement provisions set forth in Article 29 of the collective bargaining agreement differed from the 1988 collective bargaining agreement that was in existence at the time of Complainant's forced retirement, the difference in the 1991 collective bargaining agreement, i.e., the express language in Article 29 which calculates the 20 years of "active duty" in terms of records kept by SERS in the alternative law enforcement pension plan, did not differ in any significant detail from Respondent's interpretation of the 1988 collective bargaining agreement which also viewed the 20 year "active duty" requirement to mean 20 years according to SERS records. Indeed, Respondent maintained that it viewed the SERS calculation of time as the relevant standard for determining "active duty" even though the 1988 collective bargaining agreement never expressly mentioned the SERS calculation and even though the lead negotiator for Respondent never had an oral agreement with the union before January 1, 1992 that the calculation for 20 years of active duty would be based upon SERS records.

Moreover, while it is true that the mandatory retirement exemption provided in section 2104(A)(7) expired

on December 31, 1993, the record reflects that Sanchez would have satisfied all requirements for the forced retirement provision of Article 29 (i.e. over 62 years of age and "creditable service date" of August 1, 1993) on August 1, 1993. Here, although Respondent did give technical notice to Sanchez in August of 1995 of the mandatory retirement provisions contained in the collective bargaining agreement (which it later rescinded due to its interpretation of the ADEA), Respondent has not explained why it did not insist that Sanchez retire at the earliest moment after having met all of the requirements for forced retirement under the terms of the 1991 collective bargaining agreement in August of 1993, while it required Complainant to retire a mere four days after Complainant had met all of the criteria for forced retirement under the 1988 collective bargaining agreement.

The existence of Sanchez as a suitable comparative, however, does not automatically require a finding of liability under the instant record. Here, Complainant could show at most that one coworker, approximately two years younger than he, received more favorable treatment from Respondent in the implementation of its forced retirement plan. Such evidence of age discrimination, though, is particularly underwhelming where the evidence shows that at least four other individuals who received more favorable treatment were older than Complainant.[6] See, for example, *O'Connor v.*

[6] Moreover, even if the "ranked" investigators are taken out of the mix and only unranked investigators are compared, the result is still the same since Foley, an unranked investigator received more favorable treatment. Again, Complainant is reduced to arguing that he is the victim of age discrimination in a system where, at time, older and younger individuals are treated more favorably.

Consolidated Caterers, _U.S._, 116 S. Ct. 1307 (1996), the Court observed that an inference of age discrimination cannot be drawn through a comparison of one worker with another who is "insignificantly younger", and *Kuhn v. Ball State University* 78 F.3d 330, 332 (7th Cir. 1996) where the court emphasized that a finding of discrimination requires a "goodly" sample of discriminatory acts.

Alternatively, it should be noted that Complainant is correct that Respondent has not explained why, if the ranked officers were not forced to retire pursuant to Article 29 of the collective bargaining agreement, Respondent did not forcibly retire these officers pursuant to section 2-115 of the Motor Vehicle Act when they turned 60 years old. However, this seeming incongruity does little to advance Complainant's age discrimination claim because: (1) this Commission is not equipped to enforce an alleged violation, of a provision of the Motor Vehicle Act; and (2) Complainant has not argued that Respondent did not have a *bona fide* retirement plan for at least unranked investigators for purposes of applying the mandatory retirement exemption contained in section 2-104(A)(7). Indeed, the record reflects at least four other investigators in the 1979 to 1980 time period were mandatorily retired by Respondent, and I would note that Respondent and the union went to the trouble of putting in Article 29 which called for mandatory retirement of Respondent's investigators in the various collective bargaining agreements contained in this record. Hence, this is not a situation where Respondent has manufactured an alleged retirement plan as an excuse to explain away Complainant's forced retirement. Thus, for all of the above reasons, I find that Respondent has shown by a preponderance of the evidence, that it had in

place at the time of Complainant's forced retirement, a *bona fide* retirement plan calling for Complainant's mandatory retirement, that Complainant was subject to such retirement plan and that the instant forced retirement of Complainant was exempted under section 2-104(A)(7) of the Human Rights Act.

Finally, it should be noted that Complainant, in a separate argument, has urged me to construe the recognition and mandatory retirement clauses of the 1986 and 1988 collective bargaining agreement in order to support his claim that he was the victim of age discrimination. Specifically, Complainant contends that: (1) Respondent's only explanation as to why he was treated differently from DiSabato, Sandona and Woods was the fact that none of these ranked investigators were covered under the terms of the collective bargaining agreement; (2) at least the mandatory retirement terms contained in Article 29 of the collective bargaining agreement included all three individuals in spite of Respondent's interpretation of the agreement; and (3) because ranked and unranked investigators were subject to the mandatory retirement provision of the collective bargaining agreements, they constituted suitable comparatives for purposes of establishing age discrimination.

Complainant's arguments, however, ignore the jurisdictional boundaries of what the Commission can resolve when rendering a decision on a complaint. Specifically, in *Carver Lumber Co. v. Illinois Human Rights Comm.*, 162 Ill. App.3d 419, 515 N.E.2d 417, 113 Ill. Dec. 608 (3rd Dist. 1987), the court, in finding that the Commission was without jurisdiction to consider a handicap claim where the complainant sought an accommo-

dation which would violate terms of a collective bargaining agreement, reaffirmed the notion set forth by the United States Supreme Court, in *AllisChalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904 (1985) that where the resolution of the State claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, the claim is either one under Section 301 or under Federal contract law.

Here, it would appear that Complainant wants me to construe the terms of the 1986 and 1988 collective bargaining agreements in order to resolve who was actually covered under the contract and what the parties actually intended when it included the "20 years active duty" language in the mandatory retirement provisions of said agreements. This determination, however, is better left to the federal courts to resolve. Moreover, should the Commission deem otherwise, I would find that only unranked investigators were covered under the contract due to the reference to the Illinois State Labor Relations Board case limiting the union's representation to only unranked investigators[7]. Indeed, Complainant has not offered any labor law authority which could explain how a union limited to the representation of a certain group of employees could bind a different group of employees to terms contained in a collective bargaining agreement. In any event, whether Respondent should have viewed ranked inves-

[7] Indeed, it could be argued that when Captain Price referred to Article 29 of the collective bargaining agreement as the reason for Complainant's termination, Complainant's sole recourse should have been the federal courts to the extent that Complainant has contested here that Respondent, for various reasons, has misconstrued the language of Article 29.

tigators as being covered under the terms of the either collective bargaining agreement is irrelevant in the instant case since any inclusion of such individuals (who were all older than Complainant) only highlights the fact that age had nothing to do with Respondent's decision to invoke the terms of Article 29 to effectuate Complainant's forced retirement.

Recommendation

For all of the above reasons, it is recommended that the instant Complaint and the underlying Charge of Discrimination of John D. Langley be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

s/Michael R. Robinson
MICHAEL R. ROBINSON
Administrative Law Judge
Administrative Law Section

ENTERED THE 16 th DAY OF JANUARY, 1998.

APPENDIX I

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

CHARGE NO: 1984 CF 9002
ALS NO: 1164(L)

IN THE MATTER OF.

DEPARTMENT OF HUMAN RIGHTS, et al.,
Complainants,

and

STATE OF ILLINOIS,
OFFICE OF THE SECRETARY OF
STATE,
Respondent.

ORDER AND DECISION

This matter is before our panel of the Commission to consider the Recommended Order and Decision entered by Administrative Law Judge, Stephen X. Lythcott. Judge Lythcott was asked to determine whether the policy of the Secretary of State which calls for the forced retirement of investigators at age 60 violates the Illinois Human Rights Act. This is the same issue which has been ruled upon by another panel of this Commission in the case of *Mikusch and State of Illinois, Office of the Secretary of State*, Charge No. 1981CF0146,et seq. For the reasons stated by the Commission Panel in that case, we believe that the Secretary of State has violated the Human Rights Act. A copy of the Commission Panel's decision in the *Mikusch* case is attached hereto as Appendix A and incorporated by reference herein.

IT IS THEREFORE ORDERED:

1. The complaint of the Department of Human Rights, Charge No. 1984CF9002, is sustained.

2. The Complaint of Lyly Pratt, Charge No. 1983CF0416, is sustained.

3. The Complaint of Gerald Jackson' Charge No. 1983CF0417, is sustained.

4. The Complaint of Joseph Quest, Charge No. 1983CF0467, is sustained.

5. The Complaint of Wayne Misfeldt, Charge NO. 1983CF0468, is sustained.

6. The Complaint of Columbus Disabato, Charge No. 1983CF2380, is sustained.

7. The Complaint of Robert -Schmitt, Charge No. 1983CF2381.

8. That the Recommended order and Decision and the Interim Recommended order and Decision in this case are affirmed, adopted. by the Commission, and incorporated by reference herein.

9. That the Respondent is ordered to cease and desist forthwith from disqualifying Complainants and others from employment as investigators solely upon their attaining the age of 60 years.

10. That the Respondent is ordered to cease and desist forthwith from taking any measures henceforth to compel or coerce Complainants or any others it may employ as investigators to

retire because they hav[illegible]ttained any age younger than 70 years.

11. That the Respondent is ordered to reinstate any Complainants who may have been retired pursuant to the Respondent's policy during the course of these proceedings to their positions as investigators with all rights and benefits of employment, including seniority and service credit intact, and with full recompense for all back pay and other losses suffered as a consequence thereof.

12. That the Respondent, is ordered to report to the Commission within 45 days following the entry of this Order, the steps it has taken to comply therewith.

13. That this Order and Decision is final and appealable.

(Commissioner Manuel Barbosa, Commissioner Alfred C. Whitley, Commissioner Rebecca Sive-Tomashefsky

HUMAN RIGHTS COMMISSION

s/Manuel Barbosa
s/Alfred Whitley
s/Rebecca Sive-Tomashefsky

ENTERED AUGUST 28, 1985

APPENDIX J

Rule 23. Disposition of Cases in the Appellate Court

The decision of the Appellate Court may be expressed in one of the following forms: a full opinion, a concise written order, or a summary order conforming to the provisions of this rule. All dispositive opinions and orders shall contain the names of the judges who rendered the opinion or order. Only opinions of the court will be published.

(a) **Opinions**. A case may be disposed of by an opinion only when a majority of the panel deciding the case determines that at least one Of the following criteria is satisfied, subject to the limitations contained in the accompanying administrative order:

(1) the decision establishes a new rule of law or modifies, explains or criticizes an existing rule of law; or

(2) the decision resolves, creates, or avoids an apparent conflict of authority within the Appellate Court.

(b) **Written Order**. Cases which do not qualify for disposition by opinion may be disposed of by a concise written order which shall succinctly state:

(1) the germane facts;

(2) the issues and contentions of the parties when appropriate;

(3) the reasons for the decision; and

(4) the judgment of the court.

(e) **Effect of Orders**. An unpublished order of the court is not precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case. When cited for these purposes, a copy of the order shall be furnished to all other counsel and the court.

(f) **Motions to Publish**. If an appeal is disposed of by order, any party may move to have the order published as an opinion. The motion shall set forth the reasons why the order satisfies the criteria for disposition as an opinion and shall be filed within 21 days of the entry of the order.

APPENDIX K

STATE OF ILLINOIS
HUMAN RIGHTS COMMISION

CHARGE NO: 1991SA 0096
EEOC NO: 21B903376
ALS NO: S-5288

IN THE MATTER OF:
JOHN D. LANGLEY,
Complainant,

and

ILLINOIS SECRETARY OF STATE,
Respondent.

PRE-HEARING MEMORANDUM

A. Counsel For Complainant:

James B. Wham
Wham & Wham Attorneys
212 East Broadway
Post Office Box 549
Centralia, Illinois 62801
(618) 532-5621

For Respondent:

Robert B. Powers
Assistant Counsel
Secretary of State's Office
298 Howlett Building
Springfield, Illinois 62756
(217) 785-3094

B. Material Facts
Complainant Proposes the following numbered Material Facts:

1. As of August 14, 1990 the following named employees of the Secretary of State, Department of Police, were permitted by the Secretary of State to continue their employment although each of them were at that time over the age of 62 years: Columbus the *Margolis* decision:

> "The District Court specifically noted that Illinois law in effect on March 3, 1983 required Illinois State Policemen to retire upon reaching age 60, citing Ill. Rev. Stat. 1983, ch. 121, par. 307.121. The identical analysis holds true in the instant case. The applicable State law in effect on March 3, 1983 was Illinois Revised Statutes, ch. 95 1/2, par. 2-115 (as amended by P.A. 82-977 effective January 1, 1983) concerning investigators for the Secretary of State which reads in pertinent part: No person may be retained in service as an investigator under this section after he has reached 60 years of age. Like Burke, Complainant herein misconstrued which was the 'applicable state or local law on March 3, 1983.'" (Emphasis added)

The Order of the Administrative Law Judge further stated at page 6:

* * *

> "Under the existing collective bargaining agreement calling for mandatory retirement at age 62 rather than at age 60 as called for in the statutes, the Complainant herein was able to retain his position two years beyond that which would have

been called for without the contractual agreement." (Emphasis added)

Complainant contends that under the law of the case as determined by the Administrative Law Judge in the order referred to above, that Investigator-Lieutenant Columbus DiSabato, Investigator-Major Robert Sandona and Investigator-Lieutenant Raymond A. Wood should all have been required by the Secretary of State to retire at age 60 as required by the above statute if they were not subject to Article 29 of the Agreement between the Secretary of State of Illinois and Fraternal Order of Police Lodge 95.

Whether DiSabato, Sandona and Wood were bound by Article 29 or by the statute, in either event, the Secretary of State unlawfully discriminated against the Complainant Langley in requiring him to retire at age 62 while permitting DiSabato, Sandona and Wood to serve beyond their 62nd birthdays. This discrimination by the Secretary of State not only violated the law, but also violated Section 2 of Article 4 being the NonDiscrimination provision of the Agreement which provides that:

> "The employer shall not discriminate against officers .... nor shall the employer discriminate against officers as a result of membership or non-membership in the Lodge."

Respondent's defense asserted against Complainant's discrimination claim based on the fact that DiSabato, Sandona. and Wood had rank and that Langley had no rank is nothing but a selfserving, irrelevant and inaccurate invention. Nothing in writing or in practice justifies such a distinction. It is Complainant's position that if DiSabato, Sandona and Wood were not bound by Article

29 of the Agreement then DiSabato, Sandona and Wood were bound by the 60 year statutory retirement requirement. In such event, the Secretary of State was required to terminate their services in accordance with the statute referred to above, namely, that: "No person may be retained in service as an Investigator under this section after he has reached 60 years of age."

In either event, the discriminatory act by the Secretary of State requiring Langley to retire, while at the same time permitting DiSabato, Sandona and Wood to serve when the statute or the Agreement required their retirement, is a clear violation of the equal protection rights of Langley under the Fourteenth Amendment to the Constitution of the United States of America.

2. The Complainant contends that age is a protected status under both Federal and State law. The Supreme Court of the United States in *EEOC v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983), decreed that the Age Discrimination in Employment Act (ADEA) applies to state law enforcement officers. "In 1986 Congress amended the ADEA to permit state governments to restore the mandatory retirement age that had been in place on March 3, 1983, the day after the Supreme Court handed down *EEOC v. Wyoming*:

> "It shall not be unlawful for an employer which is a State [or] a political subdivision of a State ... to discharge any individual because of such individual's age if such action is taken (1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and (2) pursuant to a bona fide hiring or

retirement plan that is not a subterfuge to evade the purposes of this chapter. 29 U.S.C. § 623(j)."

McCann v. City of Chicago, 968 F.2d 635 (7th Cir. 1992), *cert den.* 61 U.S. L.W. 3370 (1993), [This case was cited and relied on at page 6 of the Order entered by the Administrative Law Judge

APPENDIX L

BEFORE
THE HUMAN RIGHTS COMMISSION
STATE OF ILLINOIS,

Charge No. 1991-SA-0096
ALS No. S-5288

IN THE MATTER OF:

JOHN D. LANGLEY,
Complainant,

vs

ILLINOIS SECRETARY OF STATE,
Respondent.

VOLUME III

Hearing held, taken before Julie J. Mayer, CSR, RPR, and Notary Public, on the 28th day of May, 1997, at the hour of 9:00 A.M., at 404 Stratton Building, Springfield, Illinois, before Judge Michael Robinson, duly appointed Administrative Law Judge.

it at that. And I suppose the only thing I can tell Mr. Wham not to do is to make either full or partial settlement of his client's case without the prior knowledge of Mr. Powers, is that - -

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Transcript by
ASSOCIATED COURT REPORTERS
1-800-252-9915
404 East Main Cross
Taylorville, Illinois 62568
(217) 824-5717
444 First of America Center
P.O. Box 3243
Springfield, Illinois 62705

MR. POWERS: I don't want to belabor this day's efforts on this issue. I simply wanted to bring it to your attention.

JUDGE ROBINSON: All right. Do you want either of these introduced?

MR. POWERS: No.

JUDGE ROBINSON: Okay. All right, Mr. Wham, you may present your case in rebuttal.

MR. WHAM: Thank you, Your Honor.

First, before I present the evidence, I have prepared a motion for finding of liability in favor of the Complainant at the close of the Respondent's evidence.

Have I given you one of those yet?

MR. POWERS: I haven't seen it.

MR. WHAM: Now what I have done in this motion, I have analyzed this case up one side and down the other.

I have taken apart every possible position that anyone can take that is within my sometimes limited intellect.

But nevertheless, it is our concept of this case that as of right now, without our introducing another scratch of evidence, that the Complainant, John Langley, has established a prima facie case of unlawful discrimination against the Respondent, which prima facie case has established a rebuttable presumption that the Respondent unlawfully discriminated against the Complainant, and that the Respondent has failed to rebut the presumption and has failed to articulate a legitimate nondiscriminatory reason for its decision to require the

mandatory retirement of John Langley against his will.

Nowhere in the records, either by pleading or proof, has the Respondent articulated the reason for enforcing a program of mandatory retirement for all Secretary of State investigators in such a discriminatory manner so as to permit DiSabato, Sandona and Wood to work as investigators for the Secretary of State as long as they wished, while at the same enforcing forcing the Complainant Langley to retire against his will.

What are the scenarios? Let's take the case, assuming the case to be as the order of the Administrative Law Judge on April 16, 1992 viewed this case - -

And incidentally, as a preview of the future comments here, we're going to ask Your Honor to reexamine that interlocutory order and conclude to the contrary that the 70 year law applied instead of the 60.

But staying with the - -

JUDGE ROBINSON: Let me stop you right there. Let's say that, for example, that there was an error made in the law and that the Administrative Law Judge improperly found that 62 was the appropriate date.

MR. WHAM: You mean 60?

JUDGE ROBINSON: 60 was the appropriate date. And let's say that our Respondent shared that view and shared that view since 198— let's say 185 through 1995, for example.

Let's say that that was the case.

That we're finding out after the fact that the legal stance of the employer was wrong.

But there was case law out there that might have said that was the right stance.

How does that affect your claim if all we can show is that the employer was laboring under an incorrect stance in the law, although we can't say that that stance was unreasonable at the time?

MR. WHAM: I've taken this thing apart and considered that very thing Your Honor is talking about.

I'm viewing this case first, and the first scenario I'm discussing is assuming that 60 is the law, assuming that, as the Administrative Law Judge found

JUDGE ROBINSON: Okay. But my stance is why is it age discrimination when the employer wasn't thinking about age, but was thinking about what the law permits it to do?

MR. WHAM: What is that though? They've never said. They've never articulated what they think they had a right to do as far as DiSabato, Sandona and Wood.

Not once have they articulated a reason, whether it was a mistake of the law, whether it was anything, they haven't articulated it. They have to come up with the articulation. They haven't done it.

Let me answer Your Honor's question. Assuming that she made the mistake and they labored under that mistake, they labored then under the proposition that 60 was the magic law on, in effect March 3, 1983, which is the magic date.

So we examine that scenario. And if they had, and if they did assume that 60 was that date, the discrimina-

tion is apparent because here's what we've got in this case, as I've tried to articulate from the start.

We've got the Secretary of State, the common employer of all these investigators, the ranked and the nonranked, the Secretary of State has a common policy of mandatory retirement. Every one of these people are going to have to mandatory retire some time.

And when they apply mandatory retirement against the one group and not against the other, where is that articulation of a

rational, reasonable basis that's, that is sufficient to overcome the prima facie case?

Do they say merely because there is rank? No, that hasn't got anything to do with it.

Because the retirement policy on age is not based on rank. It has to do with nonranked and ranked.

It has to do with a year reference to the nonranked that's different-than the year reference to the ranked.

But it is still a mandatory retirement scheme, in the good sense of the word scheme, a mandatory retirement scheme that applies to everybody alike.

These people are similarly situated because they are all under this mandatory retirement provisions that the Secretary of State must enforce or can enforce or maybe has a discretion to enforce. Let's say that.

But any way you look at this, when the Secretary of State — and believe me I do not say this with any disrespect to the Secretary of State, that's not the issue, it's what was done - - when the Secretary of State says

look, I'm going to enforce the contractual requirement that Langley retire, but I'm not going to enforce the statutory requirement that DiSabato, Sandona and Wood retire, that is discrimination on an age basis.

Because that's the only basis upon which they're making Langley retire. They're not doing it on his qualifications. They're not doing it on his performance. They're not doing it on his health or abilities in any way. It's pure and simple age.

Now let's take another scenario. Let's say if they rely on the fact that Langley is under a union contract and they are not, then give them the, give them that issue.

They are not under it. Langley is. Does that make a difference to put them in a different category? No, not when the key issue is the enforcement of mandatoriness with regard to both.

Let's see what would happen if there was the law that said that, look, nonranked, retire at 62; ranked, retire at 60, in one fell swoop, in one piece of legislation. And then the Secretary says, Langley, you got to retire because you're 62.

DiSabato, Sandona and Wood, you're way over 62, but you don't have to retire even though the law says that you have to retire at 60. Discrimination? What else could it be?

Articulation of why? None. There isn't. Absolute silence. And the reason there's silence, they know that the minute they try to explain it, they're done.

Because they can't come up with a reasonable, rational basis for it.

Let's turn to another trick. Let's say they're all under the same contract; 62 for nonranked, 60 for ranked. And they say Langley, we're going to enforce this contract against you, but we're not going to enforce this contract against DiSabato, Sandona and Wood. Discrimination? Of course there's discrimination. Age discrimination.

It's only based on age. So taking their position on 60 years being the magic number, as far as the law in force in Illinois in 1983, March 3, after EEOC vs Wildman came down the line, then there is discrimination on the face. Now what are we going to say about if it was something else? Let's say they then say, look, there is a cease and desist order out there. There is a cease and desist order that says, back in 1981, that the Secretary of State shall not take any action in enforcing the age under 70. It's cited in here. I forget where it is.

MR. POWERS: Page 17.

MR. WHAM: Cease and desist orders in 18 Illinois Human Rights Commission Reports 51. That the Respondent is ordered to cease and desist forthwith from taking any measures henceforth to compel Complainants or others it may employ as investigators to retire before they have attained any age younger than 70.

Now is that in effect? Let's assume it is. Does it allow them to discriminate against Langley by not giving him that same attention that they gave DiSabato, Sandona and Wood, et cetera?

No. Because this is all inclusive. The Secretary of State cannot take any measures, that's contract and otherwise, to compel or coerce, and coercion is when you make somebody do something against their will, any

investigator, and that includes Langley, to retire before they have attained any age younger than 70 years.

If their thrust was here, the reason we didn't make DiSabato and et cetera, retire, because here, hang out that cease and desist order, and Langley then can go, or can he?

Can he? Because he is an investigator and the cease and desist order is broad enough to encompass him. It encompasses everybody. It encompassed Mikusch. It encompassed DiSabato, Woods, Sandona, Foley, Langley, anybody that's there as an investigator.

So if they go that route, and say that's why they would not enforce it against DiSabato, et cetera, they have run into a cul-de-sac in their reasoning. They cannot get their way out because they're done the minute they enunciate that as a principle.

So then we go to Mikusch itself. We're going to say are they, well, in between the Circuit Court of Sangamon County sustaining the Human Rights Commission, there was an appeal. And the appellate court, in March of 1989 or some month, had reversed the circuit court and said, oh, no, the 60 year is in effect. Is it?

If they adopt that rationale, all that time DiSabato, Sandona and Wood are over 60 for several years.

Prior to making Langley retire at 62, they've allowed these people to continue on. Discrimination? You're back to square one.

As I said, they cannot do this and not have discrimination on an age basis alone, because that's all that's involved.

There isn't anything that is criteria oriented as to why they would do this. They haven't articulated a reason why. Confusion of the law? If it's confusion of the law as to DiSabato, Sandona and Wood, it's confusion of the law.

It's confusion of the law as to Langley. In other words, if they say the 70 applies and they were afraid to fire DiSabato, Sandona and Wood because they're going to get sued, why not Langley? Why not bring him under the tenets?

Of course they had to bring him under the tenets if there was not abject discrimination. And they had not articulated their way out of that one, because as I said, the astonishing silence on their part is a confession that they know there is no way out of the cul-de-sac.

They can't articulate a reason that is valid and rational as to why they should allow this to be done in that way.

To go to Mikusch itself, Mikusch came down the line on October 4, 1990, after the firing, or after the forced retirement.

All right, October 4, 1990. Do you know — I'm sure you know, that's a rhetorical question — does Your Honor remember that Mikusch, they held that there was an inherent conflict between the Human Rights law and the Motor Vehicle Code.

And they preferred the Human Rights law, and said it preempts the very law that they would have to be 60 at that time.

And in the preemption of that, then that became the law that was in effect on March 3, 1983, regardless of

what Margolis, the federal Judge, fine federal Judge, but he was under, he was operating under a handicap.

The reason he was under a handicap, knowing very well that he must apply Erie Railroad against Tompkins, that requires a federal Judge, in determining State law, to apply State law.

And where does he look? To the Supreme Court of Illinois for that information.

Unfortunately, the Supreme Court of Illinois had not come down the line with that decision. It was still pending in there.

So when Margolis is annunciated and ruled on, decides, well, the Human Rights Act did not preempt the Motor Vehicle Act. As the federal court said, that was in, in February of 1990. Supreme Court is not going to come down until October 4, 1990.

And so what effect is Margolis? And that's why we're asking Your Honor that somewhere along this line, to reconsider this interlocutory order, which of course is within the Court's prerogative. It's Hornbook law. I've got a case cited and so, to reexamine that.

The Margolis case went ahead and decided that. But then the very case that the defendant or Respondent relies on, and that the Administrative Judge cited, the McCann case comes down the line, Circuit Court of Appeals, Seventh Circuit.

What does that do? It does nothing but support us. Here's why. First dealing with the McCann, with the issue that was confronting that court; ranked policemen of Chicago and unranked policemen of Chicago for 60 years have been forced to retire at 63 years of age.

Then comes EEOC versus Wyoming and knocks that prop out from under that. And so the City of Chicago, operating as a home rule city, under the law of Illinois, they are the ones then that are in control as much as the legislature would be in control.

They adopted the 70 year. And in the course of that, then they entered into a contract with the unranked policemen in a union organization to apply the 70 years.

Then comes the 1986 amendment to the Human Rights Act, and they come within that window of opportunity, and they then go back to the same thing they had before, that had for 60 years, 63 years of age, as far as everybody is concerned.

Now when they did that, then directly the ranked policemen said, hey, wait a minute, equal protection. You're letting these other guys stay until 70. You're making us get off at 63. You say no way. We've got a right to do that because of the very statute. This is not going to be forever. It's going to come to an end.

But we have a right to have this statute, because that's what the Human Rights, the ADEA Amendment said we could have. And so we reestablished that at that time:

And then what? We can't fire these other fellows because we've got a contract with them. And so we're going to let them run until 70. We've got to.

Okay. How is that similar? It's not. Because in that case, the issue was not preferring one over the other as far as age is concerned, because they applied the same requirements, the requirements of 63 as to the ranked, they applied 70 as to the nonranked.

Now if that case had involved an incident like I referred to the other day, where this patrolman was

allowed to continue on until he was 75 years old, and another patrolman until he was 73, and another one until he was 76, and then firing these other people at 63, you would then have an identity of this case. But you don't.

That is not there. So the issue was not there in McCann as it is in this case. Because the issue was never raised, couldn't be, because they were applying the 70 year to the one and the 63 year to the other, as they had a right to do and had a duty to do.

Not so here, as I've indicated. But now where does the McCann then really come down the line to help us?

It's in those parts of our brief that we have, or motion that, we will call your attention to Page 19 and 20, where we're discussing the McCann case.

In fact, down at the bottom, in fact, the McCann case contains a specific reference to State vs Mikusch at Pages 636 and 637 of the opinion wherein the Court states that between 1980 and 1987, the Illinois Human Rights Act, which applies to private and public employer's, forbade mandatory retirement before the age of 70.

Plaintiff's submit that the age of retirement in effect under the applicable State or local law on March 3, 1983, was accordingly 70.

One district judge has agreed. Jirus vs Berwyn applies.

Chicago replies that the Human Rights Act does not govern because the Illinois Municipal Code authorizes cities to compel law enforcement officers to retire at 63. The Illinois Municipal Code is the one that gives that power of home rule to the City of Chicago.

(Duplicate Pages 79 – 85 eliminated intentionally)

Duplicate pages 79-85 eliminated intentionally.

Then it says, then it deals with Mikusch, and it has this very significant statement to make, State versus Mikusch, citing the Supreme Court decision, casts substantial doubts on this approach, for it holds that the Human Rights Act displaces part of the State's Vehicle Code separating State vehicle investigators from office at age 60.

We called for supplemental briefs after argument on the effects of Mikusch, which neither party has discussed.

They go on and say then, if you turn to Page 21, as recognized by the Seventh Circuit Court of Appeals in McCann versus Mikusch, case holds that, in McCann, the Mikusch case holds that, quote, here's what McCann said about it, the Human Rights Act displaces part of the State Motor Vehicle Code separating State vehicle investigators from office at age 60. And they cite the statute 2-115.

Keeping in mind that they are applying correctly Erie Railroad against Tompkins, and also the Jones versus Salenberger case, which is a highly significant case.

And I've got the authority here for Your Honor to read, which then blurs out anything that Margolis had to say about this.

It is little wonder that you will not find one reference to Margolis in McCann, because it's an irrelevancy.

It was decided before the Supreme Court of Illinois decided that the Illinois law said that the Human Rights Act preempts the Motor Vehicle Code in regard to the age.

As far as the McCann case is concerned, if you turn to Page 23 and 24, another difference between McCann and Langley is the fact that in McCann, the contractual agreement in McCann extended to 70 rather than lessened the mandatory age retirement in effect March of 183 governing Chicago city policemen, which was 63.

In Langley, it was the other way around. It was mainly the 70 year age limit in effect March 3, 1983, when we take into account Mikusch and reexamine the Administrative Law Judge's ruling of 1982. The 70 year in effect on March 3, 1983, was cut down from the contractual agreement to age 62.

That is another difference. Then yet another difference, and this is very significant, it follows right after that, another difference between the McCann and Langley cases is this; Page 637.

The court, in McCann, held the municipal code does not set 63 as a mandatory age of retirement.

Instead — now that's the municipal code of the State of Illinois, that's not the Chicago — the municipal code does not set 63 as the mandatory age of retirement, instead it delegates to municipalities the power to set a retirement age, provided they choose 63 or over. That's what that held.

The Human, then he said, they say, the Human Rights Act does not conflict with delegation in the same direct way it superseded the retirement age in the vehicle code.

In other words, that municipal code did not specifically construct an exception to age with reference to the municipal power of the City of Chicago operating under

home rule as it did, for instance, with housing. They specifically did it with housing, but not with any regard to age.

And at Page 637, the court states, the Human Rights Act withdraws home rule powers concerning housing discrimination, but contains nothing comparable concerning age discrimination.

In other words, they don't withdraw from home rule cities the power to deal with age discrimination. They only withdrew the power concerning housing discrimination.

So that's another thing that's different. Home rule is all over the place in McCann. It doesn't even surface in this case, because it's not involved.

We say also McCann is not in point with Langley, inasmuch as there was no question raised with regard to the particular law in effect as of March 3, 1983, because it was 60 years. They'd been enforcing this law that they could, under home rule enforcement, and that's what they did.

So actually, as I've said before, McCann supports our position that the Human Rights law of 70 preempted anything that the Motor Vehicle Code said about investigators' retirement at 60.

And therefore, if they take the position that Mikusch was not decided at the time they let Langley go, it was decided on October 4, 1990, and reverted to that, they should have put him back to work immediately. Because they were allowing these other people to continue.

So when we begin to look at this case and take it apart, on any kind of a theory you want to look at, this has been

a discriminatory act against one man, the only man that was ever forced to retire against his will under the contract.

We don't have to ask Your Honor to interpret the agreement, because we're going to accept, for the purpose of argument here, on this issue regarding DiSabato, et cetera, as compared to the treatment given Langley, we're going to accept what they say, that the rank is not included in the contract, for the purpose of argument. Because we got several strings to the fiddle.- We've got several different aspects.

But on this particular aspect, we take that into account, that we don't have to ask Your Honor to interpret that contract because we're not going to premise our position on saying, well, they should have been considered to the part of that, et cetera.

So even if they're not, then any way you turn and twist these facts, any way you try to find a rational reason for the discharge of Langley compared to the continuation of DiSabato, Sandona and Wood, there just isn't any.

They haven't articulated it. They can't articulate it. It's an absolute, a complete showing of discrimination, which was stated.

We had a prima facie case. They haven't come forward with anything that can even come close to showing a rational reason for that action.

Now it has often been said that we don't consider equal protection in this court. I don't see how this court could ever avoid equal protection. That is what the whole country is based on, quality of the law applied to different people in similar circumstances. It has to be a part of the consideration.

There isn't any case I've found that says that the, somehow or another when the legislature constructed the Human Rights Act, which is one of the fundamental and most basic acts there is in this State, because it goes right back to the Declaration of Independence, it goes back to the Bill of Rights, it goes back to the Fourteenth Amendment, it is the most basic body that they could construct, the legislature could construct.

They couldn't, if they wanted to, withdraw from this Human Rights Commission the right — and I say the duty — to consider that great monumental equal protection clause in the Fourteenth Amendment.

And as mirrored in Article 1 and Section 2 of the Illinois Constitution of 1970, how do they? How could anybody put equal protection outside the payer? It couldn't. No way.

Is there equal protection? Take a look at Ciechon versus City of Chicago, Page 34 of the brief. Equal protection demands, at a minimum, that a municipality must apply its laws in a rational and nonarbitrary way.

This requires a showing that its application of the law rationally furthers some legitimate, articulated stated purpose, and therefore does not constitute invidious discrimination.

We have consistently applied these principles which are at the heart of the equal protection guarantee to protect against arbitrary government conduct. That's what we are talking about, arbitrary government.

That is what the Fourteenth Amendment was all about. To bring states into the concept of the Bill of Rights that was applicable to the federal government.

Now it's all applicable to the State government. Any kind of a State action by a State employee, State officer, legislature, court, anything else that transgresses the equal protection clause comes straight ahead against the Fourteenth Amendment.

So the action of the Secretary of State was arbitrary government conduct. And again, I'm not saying this was a bad man-that said, I want to do this to you. This is, on the face, an arbitrary government contract.

And there is no showing that this discrimination against Langley rationally, quote, out of the case, rationally furthers some legitimate articulated State purpose in applying mandatory State retirement policy.

I quote Falk, Page 35. At Page 618, they're saying the promise of equal protection of the laws is not limited to the enactment of fair and impartial legislation, but necessarily extends to the application of these laws.

So the question in this case is not whether the statute was unfair in coming up with this age, or contractual provision was unfair in coming to this age selected.

The issue involves the equal application of the statute and the contract. The same issue would be presented if both ranked and nonranked investigators were under contract, as I said. If they were both under the law, as I said.

And even if they weren't at even a different rate, let's say there was a law that prohibited a person beyond the age of 40 to serve as a ranked investigator, and that same law provided the unranked can serve until 62, how do you define whether that's equal protection in how it's enforced?

The arbitrary enforcement of making the 62 year old retire and allowing the 40 year old to continue, age discrimination.

Turn it around the other way and say you allow the 62 year old, I mean the man could go well beyond the 62, but you say when you get to be 40, you're done.

So you're enforcing one statute against one and not the same statute against the other, even though different age.

Equal protection? No. It's the other way around. Because there is no articulation of why this happens.

In Northwestern University versus Evanston, it's cited at 36, that's an Illinois Appellate case, under principles of equal protection, the classification is invalid if it is arbitrary and without a reasonable basis.

To construct a class of privileged investigators with rank and exempt them from the law requiring their retirement while enforcing this age requirement on nonranked investigators, that would constitute an unreasonable classification violative of the principles of equal protection, violative of the principles of the Human Rights Act, violative of principles of the contract itself, that says that they will not discriminate because a person belongs to this union and because the union, the contract insists that the State and the union comply with federal and State standards.

It's in their contract itself. And to construct a class of privileged investigators called ranked investigators and give them this priority of treatment, no standards have been set, none by the Secretary of State for the mandatory retirement based on duty assignment, rank, health,

ability. Age alone is a criteria and age alone is the basis for the discrimination against Langley.

Not a scratch on the paper in this case about his incapacity or ability to work. Nothing about his moral attention to duty. None, nothing about he having to perform one kind of duty, they can perform another.

The arbitrary unreasonable and unequal treatment violates these federal standards and State standards, which this bargaining agreement itself clearly specified were not to be violated.

And consequently, there is no reason for the Human Rights Commission to ignore the violations of the equal protection clause of the Fourteenth Amendment and of the Illinois Constitution that has been conclusively demonstrated by the evidence and the law in this case.

There are many types of age discrimination. You know, I've tried these cases for a guy being fired because he was beyond 55 years old because some company wants to get rid of him, so they don't have to pay a big pension somewhere down the line.

So they concoct a pretext of firing him; we're cutting down the force because of economics. His work record has not been good.

But here they bring in this 40 year old and put him in there.

Set up a prima facie case? They must announce the reason. We must prove it's a pretext. Those cases are all over the lot. I've tried hundreds of them.

But what we're talking about here is something else. We're not talking about that kind of an age discrimina-

tion. We're talking about something just as invidious, but something that cannot be articulated.

In other words, there can be no reasonable basis articulated for giving preference to the one and not enforcing the law against him and enforcing the contract against the other.

So any way you turn this case, Your Honor, any way it's examined, and comparing Langley against DiSabato, Sandona and Wood, it is just not there. They can't avoid this. They cannot articulate the reason to get them out from under the prima facie case.

And the prima facie case is there. It's been determined. And they cannot articulate their way out of it because they haven't even tried. The reason they haven't tried is because they can't say. There isn't any reason that they can point to on this phase of the case. That's just one string of the fiddle.

Now I can go on with the next, or if you want to have argument on the other.

JUDGE ROBINSON: I'm going to ask Mr. Powers what testimony would support the notion that the Respondent has articulated something in this case?

MR. POWERS: I think the fact that he was mandatorily retired at the time the Illinois Human Rights Act specifically allowed the mandatory retirement, probably in and of itself is enough, Judge.

I think the testimony, and in my argument, I want to try to again go through the different kinds of issues that are, that the courts are faced with in age discrimination cases, and what the three or four step burden of proof is in each one of those cases.

Assuming that there is a process in a mandatory retirement case where a prima facie case of showing that he was in a protected group and he was doing a good job and he was terminated, and then deciding what the rest of the four steps is, assuming that's the case, I think that the rebuttal case showed that the employer took their acts on the basis that the law allowed it.

That the contract required it as to Langley. And that, in and of itself, is the nondiscriminatory reasons for the action.

JUDGE ROBINSON: Okay.

MR. POWERS: In regard to all of Mr. Wham's equal protection arguments, I understand what he's trying to say.

I don't necessarily agree that the cases that he cites, particularly the McCann case, would even support his equal protection arguments.

The problem is it's in the wrong court. It should not be here. Federal cases are in federal court, and in some situations a state court is an appropriate place to file a cause of action alleging violation of the Fourteenth Amendment of the Constitution.

The Illinois Human Rights Commission is not the proper case to be bringing that cause of action.

Just like his arguments that the collective bargaining agreement has a nondiscriminatory provision in there, article one, article two, you violated it, you,re bad.

You have done that. That is great. That is a good argument. And there's a place where that argument should be made. It's called the Illinois State Labor Relations Board.

If you would have filed it in circuit court, it could have bounced out because of failure to exhaust its administrative remedies.

You have to file your cause -of action in the proper jurisdiction.

Alleging abuses of the collective bargaining agreement is clearly the exclusive jurisdiction of the Illinois State Labor Relations Board. It's not that his argument maybe doesn't make some sense, it's just not properly here.

Mr. Wham has, in my opinion, butchered the McCann case so badly in his interpretation of what it says and what it doesn't say.

I think the, first of all, the appellate court decision is dealing with an equal protection claim because the plaintiffs gave up their ADEA claim because Judge Grady, in the district court, not only reversed or distinguished the Jirus case, but clearly indicated and cited several other cases, Illinois cases, indicating that the Illinois Human Rights Act does not preempt the specific laws governing retirement and pensions that were in effect on March 3, 1983.

And he summarily dismissed their age discrimination case because the law specifically allowed mandatory retirement at that point in time.

The appellate court decision is also, I think, favorable even if we're going to argue equal protection.

Here is the McCann case, in dealing with the second count of the complaint on equal protection, noted that the argument is is there a violation by treating sergeants and above differently from patrol officers?

The decision says no. There's a lot of argument in there, and there's discussion about Mikusch and how that is different.

When the court is talking about Mikusch, it's saying the plaintiffs are in here arguing and Mikusch says blah, blah, blah.

It's not the seventh circuit here saying that based upon Mikusch, we think this. That is the plaintiff's argument.

Court says you're wrong. There is no equal protection violation here by virtue of the fact that your sergeants and above are treated different than your patrol officers, the equivalent of our investigators.

To get to the point of this motion, I think that if the, if there was a prima facie showing by the plaintiffs, that the Respondent has articulated a nondiscriminatory reason for the action that was taken against McCann.

I don't know whether to complete my argument at this time, or whether we're going back to Mr. Wham here, to go on to wherever he is going on to.

JUDGE ROBINSON: The one thing that I would say is that I, too, find that at least Respondent has articulated a reason.

Now the ultimate issue is as to whether there's pretext in this case. And that I don't think we can decide on this particular motion.

I am going to have to go through the records and the exhibits to find whether there was inconsistent treatment and whether the comparables are truly similarly situated.

There was one case, I think I mentioned on the last hearing, that I want both parties to talk about in their briefs, and that is the Carver Lumber case, that is cited in Page

MR. WHAM: 27.

JUDGE ROBINSON: 27 of the motion, that's in the motion for finding of liability in favor of Complainant.

As I recall the testimony at the last hearing, there was some argument by Mr. Wham that I would have to look at the collective bargaining agreement.

And now I hear that that may be not the case. But I, I want both parties to talk about that.

And if I do have to look at the collective bargaining agreement, whether Carver Lumber would say that the, that that claim is somehow preempted had under federal law.

MR. WHAM: Well, if I could reply real quickly on this. McCann, Mr. Powers misreads, not Jim Wham.

McCann involved the fact, number one, on equal protection, whether or not it was equal to require the one to have 33, 33 years mandatory retirement and the other 70.

As I said in my opening, that's not the question here. The question is the unequal enforcement of the mandatory requirement where they require the one to retire, because of the rules governing him, but not require the other to retire on the rules governing him.

So the McCann case does not get into the equal protection question that's involved here.

Second, there isn't anything Mr. Powers has cited that says that equal protection considerations are out of bounds in this, in this Commission's hearing, and he can't, because there is no case. There is none.

And it would be wrong if there was, because of the constitution itself that's binding on this Commission as well as any other.

The meanest school board, a zoning board, never gets away from equal protection. Always there.

As far as McCann is concerned, as I pointed out, the difference is they are bound to look at their case under the proposition that home rule governs. Home rule governs the City of Chicago. That meant that they can set their pays regardless of the Human Rights Act limitation, which is what that case held.

The last thing I want to say about McCann, is simply that it unmistakably recognizes that Mikusch, the Supreme Court of Illinois, which they are bound to follow, if it was involved, has unmistakably declared that the Human Rights law preempts the 60 year Motor Vehicle Law in this case, and therefore had to be the law as of March 3, 1983 .

And that's why we're asking Your Honor to view this interlocutory order in that connection, in that light. And to say that actually it was 70 instead of 60 at the time. And then the rest of our argument is so.

Now I wanted to do what Your Honor suggested, that is where does Carver come in? when we were talking about that the other day, on the view of Your Honor examining it through the contract and its meaning, only one string to the fiddle.

It doesn't apply to this string. We're saying Your Honor doesn't have to interpret the contract one minute on this because it's been so clear-cut. We were talking about the contract with regard to Foley, et cetera.

I'm talking about in this case, you don't have to consider the contract at all, as far as whether it brings in DiSabato, et cetera, because we're not even basing our argument on that in this particular phase of the case.

JUDGE ROBINSON: But don't you have to somehow establish that your three comparables are truly similarly situated, and in doing so, don't you have to look at the terms of the collective bargaining agreement?

MR. WHAM: No.

JUDGE ROBINSON: Why not?

MR. WHAM: Simply because the issue to be determined that sets parameters on what is similarly situated and what is not, must be examined to see what kind of class are we looking at?

We're not looking at a class that's dictated by rank, because mandatory retirement is enforced against nonranked and ranked.

We're not looking at duty, what Langley is supposed to do and what they're not supposed to do, that is not, that did not come within the parameters. That is not the criteria.

Age alone is the criteria. And the effect of the common employer administering a mandatory retirement system that applies to everybody, not just ranked, not just in nonranked, but to everybody, he has to apply the law

of say 60, as far as the ranks are concerned, and 62 as far as Langley is concerned, that doesn't take any interpretation of a contract to decide that.

Transcript jumps to page 84

than what it says. I mean it says what it says, and nobody needs to interpret what it says.

Until they then put in their own interpretation in 1991, which has nothing to say about this case.

Then we come to Sanchez. Sanchez, they say I should have known about Sanchez because his name was on Article 3. There's many others on Article 3.

There was nothing showing up on Sanchez until we come to the proposition that we discover, discovered by happenstance right before this hearing, two letters, two letters that — one that said in August of 195, you have got to retire. The other one said a month later, you don't have to retire.

So then they're brought in the records of Sanchez. They're in the records now. And the records of Sanchez show that he has been a Secretary of State investigator, as of the time that Langley was retired, that Sanchez — at page, yeah, the personnel records of Sanchez.

Okay. First place, Respondent agrees to Material Fact 54. That the attached document marked Exhibit #3-B contains the correct information with regard to Raymond Sanchez.

It states as of October 24, 1990, Sanchez had a hire date of August 1, 1913; birth date of January 8, 1930. His age as of October 24, 1990 was 60.74 years. His years of work on that date were 17.22 years. That's personnel records of the Secretary of State.

And then comes Exhibit Number 19, the testimony of Tina Prose, with reference to the records. And it shows that as of October 24, 1993, now that's — that's a couple of months before you're going to find the Human Rights Amendment of 1987 going out the window on December 31, 193, so this is before that, same as it was when Langley was there — that as of October 24, 1993, Sanchez' age was 63.74 years of age and his work years were 21 years, 5 months and 21 days.

So that means, cutting it back even, closer to time frame of Langley, on October 24 of 1993, his age was 62.74 years, and he had worked 20 years, five months and 21 days. There wasn't anything that intervened during those times.

That means the Secretary of State knows that a record of this man that they have allowed to continue on, clear on now, that as of that time, if they were going to treat Mr. Langley like they treated him, they would have allowed Langley to stay.

Granted, he was, he came of age after Langley. But it shows a continuation of the policy of not requiring these investigators to retire at 62.

Now they did Langley. The only one. Did he fall between the cracks for some mysterious reason? I don't know, But all I know, it shows on the face of it, as it did on the face of it with reference to DiSabato, et cetera, and his comparison with them, it shows on the face of it here, that there are investigators of the absolute same status that are allowed at the time to continue and have been allowed subsequent to that time to continue.

And it's, and it is strange then to say that this is not relevant. Of course it's relevant. It's so relevant that

we're asking to amend the complaint to conform to the proof, to allow an amendment to the complaint to be set forth showing that he was another that we were weighed against and found wanting.

Okay. But we don't even need that complaint amended, actually, to raise the relevance of this. Because it goes in to show that at the time Langley was required to retire, there were others that were allowed to continue on.

And if they'd treated Langley as they had treated the others, he would still be working, because he wants to continue to work. He's ready to continue to work. He's physically able to continue to work. And he has applied for the right to continue to work. And there it is.

So the concept of the fact that this letter said that of September 7, 195, and a letter of August of 195 are irrelevant, because they come up at another time?

No. The significance of the letter of August of 195, and that is the one that told him that he was going to have to get out, it shows a continuity of allowing him to retire up to that time.

That spells out continuation, of allowing him to continue. That's the first time in their records that shows that they ever asked him to retire, and that was long after he should have been retired, if they treated him like they did Foley — not Foley, but they did Langley.

And all of this, they can't say that the law changed in the interim, because it didn't, as far as that time frame of up until October 24, 1993. The law was the same as far as Langley and Sanchez, during that frame up until that time.

Up until December 31, 1993, the law was the same as far as Langley and Sanchez were concerned.

And as I have previously indicated, we didn't learn about the whole effects of Sanchez until this case was tried.

We got an inkling about the letters, but we didn't have his record showing what his continuity of service was.

We'd asked Attorney Powers, in advance of the hearing, to produce him, He took the position that he wasn't relevant and didn't have to produce him.

But that was resolved. It was ordered that the, that his records be produced. So that's the first time we got the records.

So when we got the records, got them in evidence, these facts have emerged. without going into great detail, these are the facts that emerged without contradiction.

So with these all admitted into evidence, it shows that there is another man that should be evaluated along with Foley. That's why we are asking to amend the complaint by adding his name in order to conform to the proof under the practice act.

So we've got that amendment here ready to offer at that time.

There is one case that needs, or one bit of evidence that needs ventilating, and that is the question of Saracco.

And we start at Page 54. The only attempt to use Saracco was to change some words, change 20 years of

active duty to 20 years of eligible credible service. That's the only reason they produced Saracco.

So they brought on the evidence of Saracco. what did they bring?

Transcript jumps to page 102

time, I'm asking that we amend, be allowed to amend the complaint by adding this to this amendment with reference to Sanchez.

I guess this is the original, June.

In this we're asking that the amendment to the amended complaint add Paragraph e(1) as follows: Raymond Sanchez, a Secretary of State nonranked investigator was born January 8, 1930, now 67 years of age, et cetera.

I'm not going to read it into the records because it speaks for itself.

JUDGE ROBINSON: All right. What I'll do, I'll take that motion with the case as well, and the parties can talk about the merits of the motion to amend to its brief.

And to the extent that we're talking about the evidentiary ruling as to the, I think it was Exhibit 417 from the Respondent, I will let the parties talk about that in their briefs as well.

MR. WHAM: I didn't hear that.

JUDGE ROBINSON: I will let the parties talk about the admissibility of that document in their briefs as well,

JUDGE ROBINSON: All right.

MR. WHAM: I tender the balance of the motion, that I have eliminated for the sake of brevity, and adopt it as if I had spoken it.

JUDGE ROBINSON: All right. And that will be filed and made part of the record as well.

Now you may present your first witness on rebuttal.

MR. WHAM: Okay. Mr. Langley?

JOHN LANGLEY called as a witness herein, at the instance of the Complainant, having been previously sworn on his oath, testified as follows:

DIRECT EXAMINATION BY

MR. WHAM:

JUDGE ROBINSON: Mr. Langley, I'll remind you you're still under oath. A. Yes, Your Honor.

MR. WHAM: Your Honor, I've given a copy of this,which is documents that Mr.

APPENDIX M

[Received March 17, 1998]
STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

CHARGE NO: 1991SA 0096
EEOC NO: 21B903376
ALS NO: S-5288

IN THE MATTER OF:

JOHN D. LANGLEY,
Complainant

and

ILLINOIS SECRETARY
OF STATE,
Respondent.

AMENDED EXCEPTIONS TO RECOMMENDED ORDER AND DECISION

ENTERED JANUARY 16, 1998 SUPPORTED BY ARGUMENT

Now comes Complainant, John D. Langley, by Wham & Wham, his attorneys, and for his Exceptions to Recommended Order and Decision Entered January 16, 1998 Supported by Argument says:

EXCEPTION I

The Administrative Law Judge erroneously failed to find for the Complainant against the Respondent on the positions of Complainant set forth in Section I of the Argument of Complainant's Brief which addressed the discriminatory treatment Complainant received from Respondent in comparison to Respondent's treatment of

DiSabato, Sandona, and Wood; and Sanchez in Section II of the Argument.

The Administrative Law Judge erroneously overlooked, ignored and misapprehended the following positions:

[A]

The Administrative Law Judge overlooked and ignored the cease and desist order entered in the matter of *Department of Human Rights v. State of Illinois, office of the Secretary of State,* 18 Ill. HRC Rep. 51 which contained the provision stating:

> "That the Respondent is ordered to cease and desist forthwith from taking any measures henceforth to compel or coerce Complainants or any others it may employ as investigators to retire because have attained any age younger than 70 - years

(Emphasis added) (Appendix 1)

This cease and desist order was presented at the Hearing. (Tr. Vol. I, pgs. 18-20) (Appendix 2)

The Administrative Law Judge overlooked this cease and desist order in the Findings of Fact #5 at page 3 of the Recommended Order and Decision. No reference to this cease and desist order was made, although it clearly appeared in the record and applies to Complainant.

The Administrative Law Judge overlooked and ignored pages 1 and 2 of Complainant's Reply Brief and Complainant's Brief at page 3 of Conclusions of Law, in Findings of Fact, Conclusions of Law and Brief of Complainant, John D. Langley, which referred to this cease

and desist order as follows:

> "The evidence established a prima facie case of Complainant against Respondent which was not rebutted by Respondent in that Complainant had not attained the age of 70 years at the time of his forced retirement against his will which forced retirement was in violation of the cease and desist order and decision of the Human Rights Commission decision rendered in: *In the Matter of: Department of Human Rights, et al., Complainants, and State of Illinois, Office of the Secretary of State, Respondent,* Charge No: 1984 C 9002, ALS No: 1164(L), (18 Ill. HRC Rep. 51)."

This cease and desist order was in the record from the outset of the case. (Tr. Vol. I, pgs. 18-20) (Appendix 2)

The Administrative Law Judge recognized at pages 18 and 19 of the Recommended Order and Decision that:

> "... Complainant is correct that ... the commission has always considered disparate treatment among similarly situated employees in order to determine whether there has been any violation of the Human Rights Act."

Langley, DiSabato, Sandona and Wood were similarly situated by the terms of the cease and desist order which prevented forced retirement before attaining 70 years and which order applied to all investigators, ranked and nonranked alike, who were employed by the Secretary of State.

Thus, Respondent is precluded from enforcing Article 29 of the collective bargaining agreement against Langley. The April 16, 1992 Order of the Administrative

Law Judge in the instant case, provides at page 6: "A labor contract may extend rights greater than mandated by law, but may not be more restrictive than existing law."

The Administrative Law Judge erroneously overlooked and ignored this position of Complainant and erroneously failed to award Complainant the damages and relief established by the evidence.

[B]

The Administrative Law Judge at page 18 erroneously agreed with Respondent that the Commission is the wrong forum to address claims based on the equal protection clause of the Fourteenth Amendment and the Illinois Constitution of 1970.

This erroneous concept is unsupported by any authority. Moreover, the Administrative Law Judge totally ignored the equal protection clause of the Constitution of Illinois (1970) being Article I, Section 2 and the Constitutional Commentary, Smith-Hurd Illinois Compiled Statutes Annotated, Article I,§ 2, Constitution of 1970, at page 64.

In Thakkar v. Wilson Enterprises, Inc., 120 Ill.App.3d 878, 458 N.E.2d 985, 76 Ill.Dec. 331, it is stated at page 333:

> "A review of the detailed legislative scheme of the Human Rights Act persuasively suggests that the General Assembly intended for it to be the preemptive vehicle for the resolution of employment discrimination cases in Illinois."

The Illinois legislature did not intend to, nor did it preclude an Administrative Law Judge and the Human

Rights Commission from exercising the power and duty to apply the Federal and Illinois Constitutional provisions of the equal protection clause.

The Administrative Law Judge erroneously overlooked and ignored Complainant's position as set forth at pages 26-32 of the Argument in Findings of Fact, Conclusions of Law and Brief of Complainant, John D. Langley. (Appendix 3) (All references hereafter to said Argument in these Exceptions shall be referred to as "Appendix 3" and the page number of the Argument.)

[C]

The Administrative Law Judge erred in not allowing Langley's claim on Respondent's own theory.

At pages 21 and 22 of the Recommended Order and Decision the Administrative Law Judge found that:

> "Complainant is correct that Respondent has not why, if the ranked officers were not forced :to retire pursuant to Article 29 of :the collective bargaining agreement, Respondent did-not forcibly retire these officers pursuant to Section 2-115 of the Motor Vehicle Act when they turned 60 years old." (Emphasis added)

Also, at pages 18 and 19 of the Recommended Order and Decision the Administrative Law Judge recognized that:

> ". . . the Commission has always considered disparate treatment among similarly situated employees in order to determine whether there has been any violation of the Human Rights Act."

The Administrative Law Judge then misconceived and

ignored Complainant's position with regard to DiSabato, Sandona and Wood being similarly situated with Complainant Langley in connection with the Respondent's administration of the mandatory age retirement system which applied to nonranked and ranked investigators.

At page 19 of the Recommended Order and Decision it is stated:

> "However, three of the five investigators Complainant cites as comparables (i.e. DiSabato, Sandona and Wood) are 'ranked' investigators, and thus, arguably disqualify them from being suitable comparatives."

This is a misconception of the criteria in determining the comparatives. Under the facts in this case rank has nothing to do with determining comparatives. Job duties and job performance have nothing to do with the question since the mandatory retirement system of Respondent is based solely on age.

The Administrative Law Judge erroneously ignored this position of Complainant stated at Appendix 3, at pages 2 and 3 and pages 8 through 11.

Simply stated, DiSabato, Sandona, Wood and Langley are all similarly situated Secretary of State investigators with respect to the administration by Respondent of its mandatory retirement program which applies to ranked and non-ranked investigators-ranked investigators by the statute requiring mandatory retirement at age 60—non-ranked investigators by the collective bargaining agreement requiring mandatory retirement at age 62. This is so on Respondent's own theory.

It is undeniable that disparate treatment of Langley

compared to the treatment of DiSabato, Sandona and Wood has been established and recognized by the Administrative Law Judge and has never been justified by Respondent.

The fact that they were older in years than Langley has 38-42).

The total amount of damages to which Complainant, John D. Langley, is entitled is $618,579.13 plus attorneys' fees which should be determined at later date at the Commission's direction. In addition to the monetary damages established by the evidence, Complainant is entitled to reassignment as a Secretary of State investigator at the same location he was assigned at the time of his forced retirement on August 14, 1990.

Complainant requests oral argument.

Respectfully submitted,

JAMES B. WHAM
WHAM & WHAM ATTORNEYS
212 East Broadway - P.O. Box 549
Centralia, Illinois 62801
(618) 532-5621
Attorneys for Complainant,
John D. Langley

s/James B. Wham
James B. Wham #02995530
NO. 5-99-0336

APPENDIX N

IN THE
APPELLATE COURT OF ILLINOIS
FOR THE FIFTH DISTRICT

JOHN D. LANGLEY,
Petitioner-Appellant,

VS.

THE ILLINOIS SECRETARY OF STATE, ILLINOIS HUMAN RIGHTS COMMISSION, and ILLINOIS DEPARTMENT OF HUMAN RIGHTS,
Respondents-Appellees.

ON APPEAL FROM ORDER AND DECISION STATE OF ILLINOIS HUMAN RIGHTS COMMISSION

ORDER AND DECISION ENTERED APRIL 23, 1999 BY

THREE MEMBERS OF THE HUMAN RIGHTS COMMISSION,

COMMISSIONER RUDOLPH S. SHOULTZ
COMMISSIONER JAMES MALOOF
COMMISSIONER CLYDE H. BROOKS

CHARGE NO:1991SA 0096
EEOC NO:21B903376
ALS NO: S-5288

ON APPEAL FROM RECOMMENDED ORDER ENTERED JANUARY 16, 1999 BY

PRESIDING ADMINISTRATIVE LAW JUDGE,
HON. MICHAEL R. ROBINSON

BRIEF OF PETITIONER-APPELLANT, JOHN D. LANGLEY

James B. Wham #02995530
Wham & Wham Attorneys
212 East Broadway
Post Office Box 549
Centralia, Illinois 62801
(618) 532-5621

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

A.

THE ALJ AND THE COMMISSION ERRED IN IGNORING AND FAILING TO ENFORCE THE CEASE AND DESIST ORDER ENTERED IN THE MATTER OF: DEPARTMENT OF HUMAN RIGHTS, ET AL., COMPLAINANTS, AND STATE OF ILLINOIS, OFFICE OF THE SECRETARY OF STATE, RESPONDENT, CHARGE NO. 1984 CF 9002, ALS NO. 1164(L), 18 ILL. HRC REP. 51 8

The Cease and Desist Order contained the provision stating:

> "That the Respondent is ordered to cease and desist forthwith from taking any measures henceforth to compel or coerce Complainants or any others it may employ as investigators to retire before they have attained any age younger than 70 years." 8

B.

THE COMMISSION ERRONEOUSLY MISCONSTRUED THE HUMAN RIGHTS LAW AND 1987 AMENDMENT THERETO, MISAPPREHENDED THE ISSUES AND THE LAW, OVERLOOKED FACTS AND MISAPPREHENDED THE POWER OF THE COMMISSION 9

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Motor Vehicle Act, Ill.Rev.Stat.1981, ch. 95 1/2, par. 2-115 requiring Secretary of State investigators to retire at age 60 ..... 11, 19

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C.

THE ALJ AND COMMISSION ERRONEOUSLY OVERLOOKED AND MISAPPREHENDED THE DISPARATE TREATMENT OF LANGLEY BY THE RESPONDENT SECRETARY OF STATE COMPARED TO THE FAVORABLE TREATMENT OF DISABATO, SANDONA AND WOOD ON EITHER RESPONDENT'S THEORY OR LANGLEY'S THEORY 24

Ill.Rev.Stat.1989, ch. 95 1/2, par. 2-115 24

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McCann v. City of Chicago, 968 F.2d 635 (7th Cir. 1992) 30

Illinois Secretary of State v. Mikusch 138 Ill.2d 242, 562 N.E.2d 168, 149 Ill.Dec. 704, (1990) 31

Illinois Secretary of State v. Mikusch 181 Ill.App.3d 431, 536 N.E.2d 1237, 130 Ill.Dec. 26 (May 5, 1989) 32

D.

THE ALJ AND THE COMMISSION ERRONEOUSLY REFUSED TO CONSIDER THE VIOLATION OF LANGLEY'S EQUAL PROTECTION RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE EQUAL PROTECTION CLAUSE OF THE ILLINOIS CONSTITUTION, 1970 34

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Kuhn v. Ball State University, 78 F.3d 330, 332 (7th Cir. 1996) (Distinguished) 39

Quinones v. City of Evanston, Ill., 58 F.3d 275, 280 (7th Cir. 1995) (Distinguished) 40

E.

THE ADMINISTRATIVE LAW JUDGE AND THE COMMISSION IGNORED UNDISPUTED FACTS WHICH ESTABLISHED, AS A MATTER OF LAW, DISPARATE TREATMENT OF LANGLEY COMPARED TO THE TREATMENT OF DISABATO, SANDONA, WOOD, SANCHEZ AND FOLEY BY THE OFFICE OF THE SECRETARY OF STATE 41

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A.

THE ALJ AND THE COMMISSION ERRED IN IGNORING AND FAILING TO ENFORCE THE CEASE AND DESIST ORDER ENTERED IN THE MATTER OF: DEPARTMENT OF HUMAN RIGHTS, ET AL., COMPLAINANTS, AND STATE OF ILLINOIS, OFFICE OF THE SECRETARY OF STATE, RESPOND=, CHARGE NO. 1984 CF 9002, ALS NO. 1164(L), 18 ILL. HRC REP. 51

The Cease and Desist Order contained the provision stating: "That the Respondent is ordered to cease and desist forthwith from taking any measures henceforth to compel or coerce Complainants or any others it may employ as investigators to retire before they have attained any age younger than 70 years." (RC 736, 844-845, 871-873) (Tr.Vol. 1, 18-19) (A 38)

The Administrative Law Judge, Michael R. Robinson, overlooked this Cease and Desist Order in the Findings of Fact No. 5 at page 3 of the Recommended Order and Decision, although it clearly appeared in the record and was relied on by Langley throughout the case and was specifically called to the attention of the ALJ in Complainant's Brief presented to the ALJ at page 3 (RC 736) and the Reply Brief (RC 871-73) and during oral argument on Langley's Motion for Finding of Liability in Favor of Complainant at Close of Respondent's Evidence May 28, 1997. (Tr.Vol.3, 32) (A 369)

The ALJ recognized at pages 18 and 19 of the Recommended Order and Decision that:

> "... Complainant is correct ... the Commission has always considered disparate treatment among similarly situated employees in order to determine whether there has been any violation of the Human Rights Act." (A 18, 19)

But then the ALJ erroneously overlooked the fact that Langley, DiSabato, Sandona and Wood were all similarly situated by the terms of the Cease and Desist Order itself which prevented forced Commission's previously pronounced policy of prohibiting disparate treatment between similarly situated individuals under the provisions of the Illinois Human Rights Act.

Any way this case is examined, turned and twisted, whether on Respondent's or Langley's theory, the result is the same—age discrimination and disparate treatment was clearly established as a matter of law.

D.

THE ALJ AND THE COMMISSION ERRONEOUSLY REFUSED TO CONSIDER THE VIOLATION OF LANGLEY'S EQUAL PROTECTION RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE EQUAL PROTECTION CLAUSE OF THE ILLINOIS CONSTITUTION, 1970

The Commission at page 9 in erroneously refusing to consider Langley's equal protection argument overlooked and misapprehended the power of the Commission and the ALJ by the erroneous, short and irrelevant statement that, "No one has authorized us to enforce the

equal protection clause of the Constitution, and thus Langley's argument must fail." (RC 1473) (A 34)

This erroneous concept is unsupported by any authority. Nothing in the Human Rights Act precluded consideration by the ALJ and the Commission of Langley's equal protection rights.

There is not a court in the land, a commission, a school district board or any statutorily created public body with judicial or quasi-judicial powers and duties that can ignore equal protection rights.

The only case cited by the Commission, *City of Springfield v. Carter,* 184 Ill.App.3d 1, 540 N.E.2d 536, 132 Ill.Dec. 796 (Ill.App.4th Dist. 1989), does not justify the ALJ and the Commission's refusal to consider the equal protection position of Langley. In fact, the Appellate Court Is reasoning supports Langley as a reading of the decision reflects at 803-05:

> " ... where there is an express grant of authority there is likewise a clear and express grant of power to do all that is reasonably necessary to execute the power or perform duties specifically conferred by the enabling statute. .. Furthermore, the interpretation of a statute must be grounded on the nature and object of the statute as well as the consequences which would result from construing it in one way or another. Legislative intent may be ascertained from the reason and necessity for the act, evils sought to be remedied, and the object and purposes sought to be obtained. ...In addition, our supreme court has found administrative agencies are given wide latitude in fulfilling their duties.

" ... Section 8-108 of the Act (Ill. Rev. Stat. 1985, ch. 68, par. 8-108) provides as follows:

"...(J) Make Complainant Whole. Take such action as may be necessary to make the individual complainant whole ***. "The Act is remedial in nature. Remedial legislation should be construed liberally to effectuate its purpose. ... Action which makes one 'whole, is action which puts the claimant in the position he or she would have been in but for the discriminatory act."

The legislature did not and could not withdraw from the Human Rights Commission the inherent right and duty to consider equal protection issues under the Fourteenth Amendment and the Illinois Constitution of 1970. Not even the Human Rights Commission itself can lawfully abdicate its power and duty to enforce equal protection rights.

The ALJ and Commission totally ignored the Equal Protection clause of the Constitution of Illinois (1970) being Article I, Sec. 2, and the constitutional commentary, Smith-Hurd Illinois Compiled Statutes Annotated, Article I, Sec. 2, Constitution of 1970 at page professors for promotion purposes.

Age, not performance, was the only reason Langley was forced to retire. He would have remained an investigator if he had received the same treatment the common employer accorded to other similarly situated investigators on the basis of age alone. This is not a case of replacement by another. It is not a case involving reduction in force. It is not a case of performance. None of the cases cited by the ALJ support the Recommended Order and Decision.

Neither does the case of *Quinones v. City of Evanston,* Ill., 58 F.3d 275, 280 (7th Cir. 1995) cited by the ALJ at page 18 of the Recommended Order and Decision (A 18) involve the issues, and consequently does not support the A.LJ's position. The case does, however recognize vicarious liability for the act of "some rogue supervisor."

Disparate treatment is the issue and the Human Rights Commission is the proper forum to give recompense for such disparate treatment received by Langley from the office of Secretary of State.

As stated in the order entered in this cause April 16, 1992:

> "If in the instant case, the employer discriminated against Complainant on the basis of his age, while treating similarly situated employees differently, under the foregoing analysis the Commission would appear to have jurisdiction." (RC 95, 102)

Equal protection rights must be enforced by the Commission regardless of the nomenclature given to the remedy.

The Commission misapprehended and overlooked these errors of the ALJ as noted above. All of these errors reflect the lack of any admissible testimony supporting the finding of the ALJ and the Commission.

G.

THE COMMISSION ERRED IN ABDICATING ITS POWER AND AUTHORITY UNDER THE HUMAN RIGHTS ACT

The Commission in the final paragraph of the Order and Decision stated:

> "While individuals may debate the wisdom of this decision, the Human Rights Commission, which is a creature of the General Assembly, does not have the authority to declare the Secretary's actions illegal." (RC 1476) (A 38)

Here, the Commission erroneously abdicated its own authority which authority the Human Rights Commission had previously asserted *In The Matter of: Department of Human Rights, et al., Complainants, and State of Illinois, Office of the Secretary of State,* Respondent, Charge No. 1984 CF 9002, ALS NO. 1164 (L), 18 ILL._HRC REP. 51. This abdication of power, if allowed to stand, would set a most unfortunate precedent. It would reduce the unenforced principles of the Human Rights Act to nothing but ineffective platitudes when high state officials and offices are involved. This erroneous decision should not stand.

CONCLUSION

Petitioner, John D. Langley, prays this Honorable Court as follows:

To reverse the Illinois Human Rights Commission's final, appealable Order and Decision entered April 23, 1999 and remand the case to the Illinois Human Rights Commission with directions to enter an Order and Decision granting Petitioner-Complainant, John D. Langley, the relief established by the evidence including reinstatement to his position as Secretary of State investigator, reassignment to the Mt. Vernon, Illinois area, payment of back and future wage loss and reinstatement of the perquisites of his position and his attorney's fees.

James B. Wham #02995530
Wham & Wham Attorneys
212 East Broadway
Post Office Box 549
Centralia, Illinois 62801
(618) 532-5621

s/James B. Wham
James B. Wham #02995530

APPENDIX O

[Received and Filed Feb 5, 2001]
NO. 5-99-0336

CLERK APPELLATE COURT
5TH DISTRICT, MT. VERNON, ILL

IN THE
APPELLATE COURT OF ILLINOIS
FOR THE FIFTH DISTRICT

JOHN D. LANGLEY,
Petitioner-Appellant,

VS.

THE ILLINOIS SECRETARY OF STATE, ILLINOIS HUMAN RIGHTS COMMISSION, and ILLINOIS DEPARTMENT OF HUMAN RIGHTS,
Respondents-Appellees.

ON APPEAL FROM ORDER AND DECISION STATE OF ILLINOIS HUMAN RIGHTS COMMISSION

ORDER AND DECISION ENTERED APRIL 23, 1999
BY

THREE MEMBERS OF THE HUMAN RIGHTS COMMISSION,

COMMISSIONER RUDOLPH S. SHOULTZ
COMMISSIONER JAMES MALOOF
COMMISSIONER CLYDE H. BROOKS

CHARGE NO: 1991SA 0096
EEOC NO: 21B903376
ALS NO: S-5288

ON APPEAL FROM RECOMMENDED ORDER ENTERED JANUARY 16, 1999 BY

PRESIDING ADMINISTRATIVE LAW JUDGE, HON. MICHAEL R. ROBINSON

PETITION FOR REHEARING

OF PETITIONER-APPELLANT, JOHN D. LANGLEY

James B. Wham #02995530
Wham & Wham Attorneys
212 East Broadway
Post Office Box 549
Centralia, Illinois 62801
(618) 532-5621

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IN THE
APPELLATE COURT OF ILLINOIS
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JOHN D. LANGLEY,
Petitioner-Appellant,

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THE ILLINOIS SECRETARY OF STATE, ILLINOIS HUMAN RIGHTS COMMISSION, and ILLINOIS DEPARTMENT OF HUMAN RIGHTS,
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PRESIDING ADMINISTRATIVE LAW JUDGE,
HON. MICHAEL R. ROBINSON

PETITION FOR REHEARING

TO THE HONORABLE JUSTICES OF THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT:

Petitioner-Appellant, John D. Langley, by James B. Wham, Wham & Wham Attorneys, respectfully requests a rehearing of this Court's Judgment and its Rule 23 Order entered on the 16th day of January 2001, pursuant to Supreme Court Rule 367 for the following reasons:

1.

THE ISSUE OF EQUAL PROTECTION

With reference to this Court's refusal to consider Langley's claims based on the Equal Protection clause under the Fourteenth Amendment to the United States Constitution and Article 1, Section 2 of the Constitution of the State of Illinois (1970), and in affirming the Human Rights Commission's refusal to hear Langley's claims based on the Equal Protection clause, this Court overlooked and misapprehended the following points:

(a) Nothing in the Human Rights Act precluded consideration by the Commission of Langley's equal protection rights, nor do the cases cited in this Court's Rule 23 Order at page 6 thereof, namely, *Miller v. Illinois Pollution Control Board, 267 Ill.*App.3d 160, 642 N.E.2d 475 (4th Dist. 1994); *Siddens v. Industrial Commission,* 304 Ill.App.3d 506, 711 N.E.2d 18 (4th Dist. 1999); *City of Springfield v. Carter,* 184 Ill.App.3d 1, 540 N.E.2d 536 (4th Dist. 1989), support such position. None of those cases involve the equal protection issue or the Human Rights Commission's subject matter jurisdiction.

(b) This Court overlooked pages 25 and 26 of PetitionerAppellant's Reply Brief on this issue as follows:

The fact that the Human Rights Commission was created by the legislature does not prevent the Commission from considering equal protection, although the words "equal protection" were not specifically referred to in the statute. To the contrary, the rationale of the very case relied on by Respondents, namely, *City of Springfield v. Carter*, 184 Ill.App.3d 1, 540 N.E.2d 536, 132 Ill.Dec. 796, Ill.App. 4th Dist. (1989), as quoted in Langley's Brief at page 34, requires that the Human Rights Commission consider equal protection issues. As stated at pages 803-05:

> " ... where there is an express grant of authority there is likewise a clear and express grant of power to do all that is reasonably necessary to execute the power or perform duties specifically conferred by the enabling statute... 11 namely, "to ... take such action as may be necessary to make the individual complainant whole ... action which makes one whole is action which puts the claimant in the position he or she would have been in but for the discriminatory act."

The legislature's non-specification of equal protection powers did not preclude the Human Rights Commission from exercising its inherent power and duty to consider equal protection rights of parties any more than did, for example, the non-specification of the Fifth Amendment by the legislature authorize the Commission to ignore the Fifth Amendment rights of parties if raised before it. These powers and duties of the Human Rights Commission are inherent in the very creation of the Commission by the Legislature.

As stated at page 34 of Langley's Brief: "There is not a court in the land, a commission, a school district board or any statutorily created body with judicial or quasi-judicial powers and duties that can ignore equal protection rights" of parties. This is a fundamental and inherent power and duty that goes along with the statutory creation of the Human Rights Commission as an inherent power to be applied in the determination of the discriminatory acts which the Human Rights Commission is empowered to redress.

Siddens v. Industrial Commission, 304 Ill.App.3d 506 cited by the Court specifically recognizes that courts and agencies have inherent powers. (286 Ill.Dec. at 208)

Moreover, the Human Rights Commission, itself, cannot avoid this inherent power and duty by simply stating as set forth in the Commission's Order that, "no one has authorized us to enforce the equal protection clause of the constitution... (Commission's Order and Decision pg. 9) (A 34)

There is no case that supports the Human Rights Commission's avoidance of its duty to enforce equal protection rights merely by the say-so of the Human Rights Commission. In fact, this is the first time the Human Rights Commission has said so. Surely, the Commission cannot avoid its duty as a commission whenever it sees fit by merely issuing its unsupported declaration rejecting its own jurisdiction. Just as subject matter jurisdiction cannot be created by agreement, neither can subject matter jurisdiction be ignored and avoided by any commission or any court. If the Human Rights Commission could avoid the responsibility of determining equal protection rights of a party, then the whim of appointed officials makes mockery of the Con-

stitutional guarantee of equal protection.

(c) The statement at page 6 of this Court's Rule 23 Order that, "... we have no jurisdiction to consider them [Langley's equal protection rights] in Langley's appeal of the order of the Commission" is a misapprehension by this Court of its jurisdictional powers and duty. This holding, as well as that of the Commission, also overlooks Langley's position at pages 35 and 36 of the Brief of Petitioner-Appellant, John D. Langley, which reads as follows:

> "The Equal Protection clause of the Constitution of Illinois (1970) being Article 1, Sec. 2, and the constitutional commentary, Smith-Hurd Illinois Compiled Statutes Annotated, Article I, Sec. 2, Constitution of 1970 at page 64 reads in part as follows:
>
> > "The guarantee for every person of equal protection of the laws was added in the 1970 Constitution. The addition gives formal expression to a principle already well recognized and applied in Illinois. The Illinois courts have frequently held that persons shall not 'be denied equal protection of the law' as a matter of State law See, *e.g.*, Heimgaertner V. Benjamin Elec. Mfg. Co., 6 Ill.2d 152, 128 N.E.2d 691 (1955); Schuman v. Chicago Transit Authority, 407 Ill. 313, 95 N.E.2d 447 (1950); People v. Gordon, 274 Ill. 462, 113 N.E.2d 864 (1916). , the Federal equal protection Of course clause also applies within the State." (emphasis added)

Thus, the Illinois Constitution of 1970 requires the Human Rights Commission and this Court to consider the equal protection rights of Langley.

(d) This Court's Rule 23 order overlooks the case cited at page 36 of Langley's Brief, namely, *Thakkar v. Wilson Enterprises, Inc.*, 120 Ill.App.3d 878, 458 N.E.2d 985, 76 Ill.Dec. 331, it is stated at page 333:

> "A review of the detailed legislative scheme of the Human Rights Act persuasively suggests that the General Assembly intended for it to be the preemptive vehicle for the resolution of employment discrimination cases in Illinois."

The Court by its Rule 23 Order erred in refusing to consider the claims of Langley set forth in Section D of Brief of Petitioner-Appellant, John D. Langley, entitled:

"THE ALJ AND THE COMMISION ERRONEOUSLY REFUSED TO CONSIDER THE VIOLATION OF LANGLEY'S EQUAL PROTECTION-RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE EQUAL PROTECTION CLAUSE OF THE ILLINOIS CONSTITUTION, 1970", (pgs. 34-40)

By such refusal to consider, this Court as well as the Human Rights Commission has overlooked the gross prejudice resulting to Langley from the non-consideration of his equal protection rights. Where, if not here in this proceeding, can Langley receive judicial consideration of these equal protection claims against the Illinois Secretary of State for the discriminatory treatment he received?

The Rule 23 Order of this Court overlooks the recent United states Supreme Court decision, namely, *Kimel v. Florida Board of Regents*, 528 U.S. 62, 145 L.Ed.2d 522, 120 S.Ct. 631, (January 11, 2000) which held that the

state could not be sued by a state employee in the Federal Court in an age discrimination case by reason of the Eleventh Amendment immunity. As stated by the Court:

> "Our decision today does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers. We hold only that, in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals. State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union.* Those avenues of relief remain available today, just as they were before this decision."

In the footnote referred to above at 145 L.Ed.2d, page 547, is cited the various statutes in the many states, including Ill.Comp.Stat., ch. 775,£ 5/1-101 et seq. (1998) (the Illinois Human Rights Act]. This decision of the United States Supreme Court clearly shows the fallacy of Respondents' contention that "Langley is in the wrong forum." (Resp. Br. 22) It is clear that Langley could not at the present time pursue this claim in the Federal Court under the Kimel ruling and that this is the correct forum.

Stevens v. Illinois Department of Transportation, 210 F. 3d 732 (7th Cir. April 11, 2000) recognizes that suits against departments of state government are equivalent to suits against a state. Langley is, thus, precluded from bringing this case against the Illinois Secretary of State in the Federal Court under the holding of *Kimel*. Langley, likewise, cannot file this case against the Secretary of State in the Illinois Circuit Court. The

proper forum for Langley's case is where it is now, as was recognized by the United States Supreme Court in the above-referred to footnote in *Kimel*.

This Court overlooked Langley's absolute right to consideration of equal protection in this proceeding. What good is equal protection if no one will enforce it to protect against the long-entrenched bureaucratic arrogance of the powerful employer in the playing of favorites among the employees?

In view of the foregoing, Langley thus far has been erroneously deprived of his Constitutional right to due process under the Fourteenth Amendment to the Constitution of the United States and Section I, Article 2 of the Illinois Constitution (1970) in that his equal protection rights under both Federal and State Constitutions have been ignored and left undetermined. Such refusal by the Illinois Human Rights Commission and this Court to consider and determine Langley's claims on their merits constitutes a violation of Langley's right to procedural due process.

WHEREFORE, by reason of the foregoing, Petitioner-Appellant, John D. Langley, respectfully requests that this Honorable Court reconsider its refusal to rule on the Equal Protection claims of Langley as set forth in his Brief and Reply Brief heretofore referred to, and grant a Rehearing as requested. PetitionerAppellant Langley is entitled, as a matter of law, to a ruling on these issues under the law of Illinois, the Fourteenth Amendment to the United States Constitution, and Article I, Section 2 of the Constitution of the State of Illinois (1970), and upon such rehearing, a determination by this Court that Langley is entitled to the relief requested, namly, an Order by this Court reversing the Illinois Human Rights

Commission's final, appealable order and Decision entered April 23, 1999 and remanding the case to the Illinois Human Rights Commission with directions to enter an order and Decision granting Petitioner-Appellant, John D. Langley, the relief established by the evidence, including reinstatement to his position as Secretary of State investigator, reassignment to the Mt. Vernon, Illinois area, payment of back and future wage loss and reinstatement of the perquisites of his position and his attorney's fees.

II.

THE ISSUE OF DISPARATE TREATMENT

This Court overlooked and did not consider Langley's claims set forth in Section C of Brief of Petitioner-Appellant, John D. Langley, entitled:

> "THE ALJ AND COMMISSION ERRONEOUSLY OVERLOOKED AND MISAPPREHENDED THE DISPARATE TREATMENT OF LANGLEY BY THE RESPONDENT SECRETARY OF STATE COMPARED TO THE FAVORABLE TREATMENT OF DISABATO, SANDONA AND WOOD ON EITHER RESPONDENT'S THEORY OR LANGLEY'S THEORY"

And overlooked and misapprehended the following points:

(a) This Court overlooked and misapprehended Langley's position set forth at pages 26 through 27 of Langley's Brief that even under the Respondents, own theory which contended that the Motor Vehicle Code, Sec. 2-115, required the Secretary of State investigators to retire at age 60, there was disparate treatment to

retire at 62 years and ranked investigators to retire at 60 years and the non-ranked investigators were forced to retire while permitting the ranked investigators to continue serving. Such would constitute disparate treatment in violation of the Human Rights Act, which is precisely the effect of the Secretary of State's action with respect to Langley in the instant case.

III.

THE ISSUE OF THE CEASE AND DESIST ORDER

This Court overlooked and refused to consider Langley's claims based on the Cease and Desist Order entered In the Matter of: Department of Human Rights, et al., Complainants, and State of Illinois, Office of the Secretary of State, Respondent, Charge No. 1984 CF 9002. ALS No. 1164 (L), 18 111. HRC Rep. 51 entered August 28, 1985.

(a) The Rule 23 Order ignores and makes no reference to the Langley's position set forth in Section A of Langley's Brief, which reads:

"THE ALJ AND THE COMMISSION ERRED IN IGNORING AND FAILING TO ENFORCE THE CEASE AND DESIST ORDER ENTERED IN THE MATTER OF: DEPARTMENT OF HUMAN RIGHTS, FT AL., COMPAINANTS, AND STATE OF ILLINOIS, OFFICE OF THE SECRETARY OF STATE, RESPONDENT, CHARGE NO. 1984 CF 9002, ALS NO. 1164 (L), 18 ILL. HRC REP. 51"

The Cease and Desist Order contained the provision stating: "That the Respondent is ordered to cease and desist forthwith from taking any measures henceforth to compel or coerce Complainants or any others it may

employ as investigators to retire before they have attained any age younger than 70 years." (RC 736, 844-845, 871-873) (Tr. Vol. 1, 18-19) (A 38) (Emphasis added)

(b)The Court overlooked pages 8 and 9 of Langley's Brief grant Langley the relief prayed in this action on the basis set forth in Section E of Langley's Brief, pages 41 through 48.

VI.

THE HUMAN RIGHTS COMMISSION'S ERRONEOUS INTERPRETATION OF THE HUMAN RIGHTS ACT WITH REGARD TO ITS JURISDICTION AND THE ERRONEOUS INTERPRETATION OF THE 1987 AMENDMENT TO THE HUMAN RIGHTS ACT

(a) This Court in affirming the Commission's statement that it, "does not have the authority to declare the secretary's actions illegal" (Order and Decision) (RC 1476) (A 37) overlooked and misapprehended page 58 of Langley's Brief wherein it is stated:

> "Here, the Commission erroneously abdicated its own authority which authority the Human Rights Commission had previously asserted *In The Matter of: Department of Human Rights, et al., Complainants, and State of Illinois, Office of the Secretary of State, Respondent,* Charge No. 1984 CF 9002, ALS NO. 1164(L), 18 ILL. HRC REP. 51. This abdication of power, if allowed stand, would set a most unfortunate precedent. It would reduce the unenforced principles of the Human Rights Act to nothing but ineffective platitudes when high state officials and offices are involved. This erroneous decision should not stand."

(b)This Court overlooked the response of Langley at pages 15 through 17 of his Brief which refute the Human Rights Commission's erroneous interpretation of the 1987 amendment to the Human Rights Act in the following respects:

(1) The Commission erred in holding that Section 2-115 of the Illinois Vehicle Code 60 year retirement provision was the applicable state law in effect on March 3, 1983, rather than the 70 year provision of the Human Rights Act. (Langley's Brief, pgs. 19-20)

(2) At page 6 of its order and Decision (A 31) The Commission misinterpreted the legislative history of the 1987 amendment by misapprehending the affect of the Governor's amendatory veto of the 1987 amendment. Inasmuch as Rome Rule cities, such as Chicago, were not bound by the 70 year retirement provision of the Human Rights Act, as was the Illinois Secretary of State and other governmental entities, and inasmuch as the Home Rule cities were authorized to compel law enforcement officers to retire at age 63 by virtue of Illinois Municipal Code Ill.Rev.Stat. (1991) ch. 24, par. 10-118(c), the language used by the Governor in the amendatory veto was necessary in that the retirement age in effect March 3, 1983 would be different as to the Home Rule cities from the age applicable to the Illinois Secretary of State and other governmental entities. (Langley's Brief, pgs. 15-16)

(3) Nothing in the 1987 amendment to the Human Rights Act supports the Commission's erroneous conclusion that the mandatory retirement provisions of the Illinois Motor Vehicle Code took precedence over the Illinois Human Rights Act retirement age provision. (Langley's Brief, pg. 17)

(4) There is nothing in the Commission's experience and expertise that requires this Court to give deference to the Commission's erroneous interpretation that by the 1987 amendment the Human Rights Act no longer took precedence over the Motor Vehicle Code with regard to mandatory age retirement provisions of the law applicable to Secretary of State investigators.

(5) The Commission at page 6 of the Order and Decision (A 31) stated that if Langley's position was correct, then the 1987 amendment was intended to have no effect. This erroneous statement of the Commission was refuted by Langley at pages 13 and 14 of his Brief in that the amendment did effect Secretary of State investigators who were 64 years of age or older on the effective date of the 1987 amendment.

(6) The Supreme Court in *Raintree Health Care v. Illinois Human Rights Commission,* 173 Ill.2d 469, 672 N.E.2d 1136, 2 20 Ill.Dec. 124 (Oct. 18, 1996) at 129 held that a reviewing court exercises independent review over an administrative agency's conclusions of law and statutory construction. (Langley's Reply Brief, pg. 21) This Court at page 4 of its Rule 23 Order overlooked the Supreme Court ruling in giving deference to the erroneous statutory interpretation of the Human Rights Commission on the statutory issues involved herein.

WHEREFORE, Petitioner-Appellant, John D. Langley, respectfully prays that this Honorable Court grant the Petition for Rehearing and upon rehearing and reconsideration of the Petition for Rehearing to grant Langley the relief prayed in this action.

James B. Wham
Wham & Wham Attorneys
212 East Broadway
Post Office Box 549
Centralia, Illinois 62801
(618) 532-5621
Attorneys for Petitioner-Appellant
John D. Langley
s/James B. Wham
James B. Wham #02995530

APPENDIX P

NO. 5-99-0336

IN THE
APPELLATE COURT OF ILLINOIS
FOR THE FIFTH DISTRICT

ON APPEAL FROM ORDER AND DECISION
STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

ORDER AND DECISION ENTERED APRIL 23, 1999
BY

THREE MEMBERS OF THE HUMAN RIGHTS COMMISSION,

COMMISSIONER RUDOLPH S. SHOULTZ
COMMISSIONER JAMES MALOOF
COMMISSIONER CLYDE H. BROOKS

CHARGE NO: 1991SA 0096
EEOC NO: 21B903376
ALS NO: S-5288

ON APPEAL FROM RECOMMENDED ORDER ENTERED JANUARY 16, 1999 BY

PRESIDING ADMINISTRATIVE LAW JUDGE, HON. MICHAEL R. ROBINSON

JOHN D. LANGLEY,
PETITIONER-APPELLANT,

VS.

THE ILLINOIS SECRETARY OF STATE, ILLINOIS HUMAN RIGHTS COMMISSION, and ILLINOIS DEPARTMENT OF HUMAN RIGHTS,

Respondents-Appellees.

PETITIONER-APPELLANT'S REPLY TO

RESPONDENTS-APPELLEES' ANSWER TO PETITION FOR REHEARING

James B. Wham #02995530
Wham & Wham Attorneys
212 East Broadway
Post Office Box 549
Centralia, Illinois 62801
(618) 532-5621

NO. 5-99-0336

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APPELLATE COURT OF ILLINOIS
FOR THE FIFTH DISTRICT

ON APPEAL FROM ORDER AND DECISION
STATE OF ILLINOIS HUMAN RIGHTS COMMISSION

ORDER AND DECISION ENTERED APRIL 23, 1999
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Respondents-Appellees.

PETITIONER-APPELLANT'S REPLY TO

RESPONDENTS-APPELLEES' ANSWER TO PETITION FOR REHEARING

I.

THE HUMAN RIGHTS COMMISSION AGAIN ERRONEOUSLY ATTEMPTS TO REJECT ITS JURISDICTION TO ENFORCE THE EQUAL PROTECTION CLAUSE

The Respondents state at page 3 of their Answer that:

> " ... the legislature's omission of any reference to the state or federal equal protection clauses indicates it did not intend for the Commission to enforce these clauses..."

Respondents continue to ignore the fundamental principal that all state officers, commissions and courts and, in fact, the legislature itself are bound by the Equal Protection clauses of the United States and Illinois Constitutions.

No State officer, commission or court can disregard the Equal Protection rights of any citizen.

Respondents did not attempt to answer and could not deny the truth of the simple example set forth at page 3 of the Petition for Rehearing, namely, that the non-specification of the Fifth Amendment by the legislature does not authorize the Commission to ignore the Fifth Amendment rights of parties if raised before it. Every commission created by the legislature has the inherent

power and duty to enforce both the Fifth Amendment and the Equal Protection clauses.

Even the legislature when it created the Human Rights Commission could not have inserted a provision in the legislation prohibiting the Commission from exercising such inherent power and duty. Nor could the legislature by subsequent enactment withdraw that inherent power and duty from the Commission. And the Commission itself cannot unilaterally disavow and refuse to perform that inherent power and duty as it has done in this case.

Respondents fail to cite authority in support of the Human Rights Commission's refusal to enforce the Equal Protection clause, while at the same time claiming at page 3 of their Answer that Langley cites no authority in support of his assertion. Langley respectfully suggests that this Court in addressing the question, should hold that the Commission does have the power and duty to determine and enforce Equal Protection Rights and erroneously failed to do so.

The cases cited at page 4 by Respondents, namely, *Gregory v. Ashcroft,* 501 U.S. 452, 111 S.Ct. 2395 (1991); *Vance v. Bradley,* 440 U.S. 93, 99 S.Ct. 939; *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 96 S.Ct. 2562 (1976) are clearly not in point. These cases do not even address the question involving disparate treatment. These cases do not support Respondents' contention that Langley's Equal Protection Rights were not violated when the treatment he received was compared with the treatment received by Sanchez, DiSabato, Sandona, Wood and Foley from their common employer, the Secretary of State, in administering the mandatory age retirement system to which all of them were subject.

In none of those cited cases was the mandatory age retirement requirement enforced against only one of the members of the class, while the common employer allowed all the rest of the members of that class to work as long as they wanted contrary to the mandatory retirement age applicable to them.

At page 4 of their Answer, Respondents fail to recognize the significance of *Kimel v. Florida Board of Regents,* 528 U.S. 62, 120 S.Ct. 631 (2000). That United States Supreme Court decision does prevent Langley, a State employee, from suing the Secretary of State or the State of Illinois in a Federal Court. As stated in the recent case of *Stevens v. Illinois Dept. of Trans.,* 210 F.3d 7321 (7th Cir. April 11, 2000), at page 736:

> "The Eleventh Amendment renders a State immune from any suit brought by an individual in federal court unless the State has consented to being sued in that forum. See Kimel, 120 S.Ct. at 640 ('[T]he Constitution does not provide for federal jurisdiction over suits against nonconsenting States.'); *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 54, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). [FN3]"

The footnote referred to is particularly applicable in demonstrating that Langley cannot sue the State of Illinois or the Secretary of State in the Federal Court. The footnote reads in part as follows:

> "... See *Estate of Porter v. Illinois,* 36 F.3d 684, 691 (7th Cir. 1994) (finding that the Attorney General of Illinois is not authorized to waive the State's Eleventh Amendment immunity)."

At pages 5 and 6 of their Answer, Respondents,

likewise, miss the point in McCann v. City of Chicago, 968 F.2d 635 (7th Cir. 1992), and particularly in making their statement at page 6 of Respondents' Answer that:

> "... the federal courts, which can enforce the equal protection clause, would not find a equal protection claim to exist under the facts of this case..."

In the first place, the City of Chicago policemen in *McCann* sued the City, not the State nor the Secretary of State. Therefore, that Federal Court action in McCann was not precluded by the Eleventh Amendment as would be the case in a suit by Langley as a State employee against the State or Secretary of State in the Federal Court.

In the second place, *McCann* did not involve discrimination as does Langley. The non-ranked patrolmen were not permitted to serve beyond the 70-year contractual age limit applicable to them, while the ranked patrolmen were required to retire at the 63-year age limit pertaining to them. As long as the City of Chicago required the ranked patrolmen to retire at 63 while the non-ranked patrolmen were required to retire at age 70, the City policemen were treated equally. That is not the case in Langley. He was required to retire at the age Respondents claim was applicable to him, while DiSabato, et al. were not required to retire at the age Respondents claim was applicable to them.

The Equal Protection Rights of the City policemen in the *McCann* case were not violated as were the Equal Protection rights of Langley in the instant case. Therefore, the *McCann* case does not benefit Respondents on any issue.

At page 6 of their Answer, Respondents continue to erroneously claim that Langley is not "in the right forum", but never do Respondents say what is the right forum.

The issues here involve the administration of the mandatory age retirement system by a State officer, namely, the Secretary of State. This is the proper forum and only forum available to Langley, and Langley is entitled to a forum.

II.

RESPONDENTS FAIL TO EXPLAIN AWAY THE DISPARATE TREATMENT OF LANGLEY COMPARED TO THAT OF DISABATO, SANDONA AND WOOD

Respondents state at page 7 of their Answer that:

> " ... the Secretary was not engaging in age discrimination, but rather was affording those investigators who were allowed to continue working a benefit to which they were not legally entitled."

Inherent in this statement is Respondents' admission that the Secretary discriminated against Langley in forcing him to retire against his will on account of his age, while at the same time permitting DiSabato, Sandona and Wood to "continue working" which was "a benefit to which they were not legally entitled" because of their age.

If this is not age discrimination and disparate treatment based on age, then what is it?

The only reason Langley was forced to retire was his age. Yet, DiSabato, et al. were not required to retire

because of their age, although they were "not legally entitled" to continue working.

There was no other reason for the forced retirement—no job performance—no physical, mental or intellectual requirements. Respondents cannot and have not explained why the Secretary's action in forcing Langley to retire was anything but disparate treatment and discrimination against him on account of age.

Respondents at page 7 make an erroneous attempt to avoid the obvious preferential treatment of DiSabato, et al. by claiming that Langley cannot complain of discrimination because they were older than he was. This makes no sense and Respondents cite no law that permits the Secretary of State, a common employer who administers a mandatory age retirement system, to selectively enforce it against one employee only, while giving preference to the others regardless of who is older than who. The playing of favorites by State officers is discrimination pure and simple regardless of the method used. Here, age was the mechanism utilized because age was the only reason Langley was forced to retire while favorites of the Secretary were not forced to retire, although their age required them to retire.

Respondents at page 7 then move on to their fallback position by stating that even though the Commission "does consider disparate treatment of any similarly situated employee in order to determine whether there has been any violation of HRA," Respondents contend that Langley and DiSabato, et al. are not "truly comparative" because Langley was non-ranked and DiSabato, et al. were ranked investigators. Rank has nothing to do with the discrimination against Langley

for the reasons set forth at pages 9 through 14 in Langley's Petition for Rehearing and the pages of Petitioners Brief referred to therein. Respondents have cited nothing to refute the position of Langley on this issue.

Respondents at page 8 make the statement that " ... the HRA was not written to protect all employees equally from decisions madeon the basis of age." This case does not involve all employees. It only involves discrimination and disparate treatment of Langley. It is certain that the legislature could not and did not give the Human Rights Commission power to condone the actions of the Secretary of State in discriminating against Langley on the basis of age by requiring him to retire and allowing DiSabato, et al. to continue working, although all were required to retire.

Respondents at page 8 of the Answer state that:

> "... Langley cites nothing in the legislative history of the HRA that would indicate it was enacted to protect younger workers from being treated less favorably than older workers."

Neither do Respondents cite legislative history that would indicate a legislative intention that the Human Rights Act should be administered in such a way that a State officer as an employer could, with impunity, engage in discrimination by allowing all but one employee to continue working beyond the mandatory retirement age and enforce mandatory retirement age against the one employee the State officer wanted to get rid of, and in the process of that manipulation, use the mandatory age retirement requirement as the mechanism in getting rid of the State employee for no legitimate reason.

There is no legitimate reason to presume that the legislature intended that such discriminatory action should be condoned regardless of whether the State employees allowed to continue working were older or younger than the employee forced to retire.

Finally, Respondents at pages 8 and 9 of their Answer misconstrue Langley's position as an examination of page 13 and 14 of Langley's Petition for Rehearing reflect.

III.
THE CEASE AND DESIST ORDER WAS IN EFFECT AT THE TIME LANGLEY WAS FORCED TO RETIRE IN VIOLATION OF ITS TERMS

Respondents at page 9 of their Answer contend that the Cease and Desist Order, 18 Ill. HRC Rep. 51, 1985 was "no longer in effect at the time he was retired" on August 14, 1990.

This is wrong. On the date of Langley's forced retirement, the Supreme Court had not decided the *Mikusch* case which decision was not rendered until October 4, 1990 (138 Ill.2d 242). The Appellate Court on May 5, 1989 (181 Ill.App.3d 431) had determined that the Motor Vehicle Code mandatory retirement age of 60 was the applicable law of retirement for Secretary of State investigators. The Cease and Desist Order was in effect and was the only reason that DiSabato, et al. could legally continue working upon reaching age 60. This Cease and Desist Order continued in effect up through and beyond October 4, 1990, which was the date the Supreme Court reversed the Appellate Court decision and held that the 70-year Human Rights Act age limi-

tation prevailed over that of the Motor Vehicle Code 60-year provision.

Respondents overlooked the fact that Langley was entitled to protection from forced retirement by that same Cease and Desist order, yet he was wrongfully required to retire on August 14, 1990, in violation of the Cease and Desist Order. Langley is the only one who did not receive protection under that Order while DiSabato, et al. were permitted to continue working when, but for the same Cease and Desist Order, they would have been legally required to retire. Thus, the disparate treatment of Langley, at the time of his discharge, was apparent in that all four of the investigators were entitled to the same protection under the Cease and Desist Order, which was still in effect on August 14, 1990, the date of Langley's forced retirement against his will.

This Cease and Desist Order was not vacated automatically by the enactment of the 1987 Amendment to the Human Rights Act. Nothing in that amendment required the Human Rights Commission to rescind its Cease and Desist Order. As long as the Commission did not vacate or change such Cease and Desist Order, the Secretary of State was prohibited from taking any action against any investigator contrary to that Order. This Cease and Desist Order precluded the Secretary of State from entering into any agreement that forced the retirement of any investigator under 70 years of age against his will, including Langley.

Respondents make no contention that the Secretary made any attempt to request the Human Rights Commission to vacate the Cease and Desist Order or modify it in any respect. Therefore, the Cease and Desist Order had the same effect as any Order of court that has not been rescinded or modified.

The 1987 Amendment pertained to other State and local entities employing law enforcement officers other than the Secretary of State, which other entities were not subject to such a Cease and Desist Order.

At page 10 of Respondents' Answer, they erroneously state that the Commission, "does not have the power to enforce a cease and desist order which is inconsistent with the HRA." This is wrong. There is nothing inconsistent with the enforcement of the Cease and Desist Order which was still in effect. Moreover, paragraph G of the Amendment provides that the Amendment shall not apply "with respect to any cause of action in effect prior to the effective date of the amendatory act of 1987.11 The *Mikusch* case was then pending and the Cease and Desist Order was in effect protecting Langley from discharge at any age less than 70.

Contrary to Respondents' statement at page 10 of their Answer, this Cease and Desist Order did not "expire" when the Amendment was passed in 1987. Otherwise, it could not have been effective in protecting DiSabato, Sandona and Wood from the date of the Appellate Court decision (May 5, 1989) that the law required their retirement at age 60. The Human Rights Commission took no action, nor was it asked by the Secretary to take any action, to limit or modify the effect of the Cease and Desist Order after the enactment of the 1987 Amendment, and therefore, it continued in full force and effect and applied to Langley, as well as to DiSabato, Sandona and Wood.

At page 11 of the Answer Respondents attempt to avoid the obvious disparate treatment of Langley compared to Sandona. The facts show on their face that Langley and Sandona were both entitled to protection

by the Cease and Desist Order as of August 14, 1990. Although neither one was specifically named in the order, both of them were included under the clause of the Order applying to "any others it (Secretary of State) may employ as investigators."

The only reason Sandona, who was more than 60 years of age, could not legally be forced to retire as of August 14, 1990 was the provisions of the Cease and Desist Order. Sandona was permitted to continue working—Langley was forced to retirealthough both were legally protected by the Cease and Desist Order from being forced to retire. Nothing else is necessary to show the discrimination and disparate treatment rendered Langley compared to the treatment rendered Sandona. Respondents point to nothing in the record showing that Sandona was permitted to continue working as of August 14, 1990 for any other reason than the requirements of the Cease and Desist Order. That was the same day that Langley was wrongfully forced to retire in violation of the same Cease and Desist Order.

Respondents at pages 10 and 11 of their Answer, obviously, do not understand the terms of the Cease and Desist Order. They state:

> "If the Commission were to enforce the cease and desist order after the 1987 amendments were in force, the Commission would be improperly nullifying or ignoring the effect of the 1987 amendments."

This is not so for the above reasons. The Human Rights Commission's Cease and Desist Order applied to every investigator employed by the Secretary of State on the date the Order was entered in the year 1985, and was still in effect on August 14, 1990, the date Langley was forced to retire. The terms of the order applied to every

investigator who was then less than 70 years of age. The passage of the 1987 Amendment did not adversely affect any Secretary of State investigator who was then protected by the Cease and Desist Order inasmuch as the Amendment did not rescind that Order. The Amendment only permitted, but did not require, other employers of law enforcement officers to enter into agreements establishing mandatory age retirement who were not bound by such a Cease and Desist Order, as that which bound the Secretary of State.

IV.
THE RESPONDENTS FAILED TO SHOW THAT THE SECRETARY OF STATE'S FORCED RETIREMENT OF LANGLEY WAS AUTHORIZED BY THE 1987 AMENDMENT

Respondents erroneously contend at pages 12 and 13 of their Answer that the mandatory age for retirement in effect on March 3, 1983 was 60 years, as provided by Sec. 2-115 of the IVC, rather than the 70-year provision of the Human Rights Act.

Respondents fail to answer Langley's positions set forth at pages 17 through 21 of the Petition for Rehearing, which establish that the 70-year provision of the Human Rights Act was the "applicable State law" on March 3, 1983. Respondents also erroneously contend at page 13 of their Answer that:

> " ... if Langley's argument were accepted, one would have to assume that the 1987 amendments were intended to have no effect because they would not change the state of the law as interpreted by the Commission in Mikusch."

Respondents ignore the fact that the 1987 Amendments did change the Human Right Act by removing the age 7.0 upper limit from that which was provided prior to the Amendment. These provisions read as follows:

> "Age. Age means the chronological age of a person who is at least 40 years old... " (Ill.Rev.Stat., ch. 68, par. 1-103 (A) (1987)

This amendment is distinguished from the Human Rights Act prior to such amendment which read:

> "'Age' means the chronological age of a person who is 40 but not yet 70 years old." (Ill.Rev.Stat., ch. 68, par. 1-103 (A) (1981)

Therefore, Respondents are incorrect when they state that under Langley's position there would be no change in the law. This was a significant change which permits an employee to work even beyond the age of 70.

It is, therefore, apparent that there was a change in the law by the 1987 Amendment which also permitted an employer of law enforcement officers to impose a mandatory retirement age for certain of those law enforcement officers "if prior to December 31, 1993 the law enforcement officer has attained the age of retirement in effect under applicable state or local law on March 3, 1983 ...", which applicable state law was 70 years of age.

These changes in the law, however, did not permit the forced retirement of Langley against his will inasmuch as he would not have attained age 70 prior to the statutorily required date of December 31, 1993. Langley was only 65 years of age on that date.

The 1987 Amendment to the Human Rights Act had no effect on the *Mikusch* case decision which gave

precedence to the Human Rights Act over the Illinois Vehicle Code age requirement.

V.

THE COMMISSION ERRED IN DENYING LANGLEY'S CLAIM FOR DISPARATE TREATMENT AS COMPARED TO SANCHEZ AND FOLEY

Respondents cite *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 313, 116 S.Ct. 1307, 1310 (1996) and *Kuhn v. Ball State University* 78 F.3d 330, 332 (7th Cir. 1996) at page 15 of Respondents' Answer in support of the Commission's ruling. Neither of these cases are on point. *O'Connor* was distinguished at page 43 of Langley's Brief.

O'Connor has no effect on the instant case. It only involved a *McDonnell-Douglas* burden-shifting scheme, which is only one of the ways of establishing disparate age discrimination, and is not in point.

Likewise, *Kuhn v. Ball State University* 78 F.3d 330, 332 (7th Cir. 1996) does not relate to the issues. It involved the ability of professors for promotion purposes.

With reference to Sanchez and Foley, Respondents have failed to answer the positions of Langley set forth in Langley's Brief at pages 41 through 45 regarding Sanchez and pages 46 through 58 regarding Foley, which clearly establish disparate treatment of Langley compared to each of them.

There is no admissible testimony supporting the findings of the Commission and Administrative Law Judge on the issues pertaining to the disparate treatment received by Langley compared to that of Foley and

Sanchez, and Respondents do not refute the positions of Langley set forth in Langley's Brief at the pages referred to above.

As to the favorable treatment received by Sanchez, the Respondents at page 14 of their Answer erroneously rely upon the Administrative Law Judge's finding of no discriminatory intent. This finding was erroneously adopted by the Commission at page 10 of its Order and Decision reading: "Judge Robinson's finding of no discriminatory intent is not against the manifest weight of the evidence." (RC 1474) (A 35) The Respondents did not and cannot refute the position of Langley that wrongful intent is not an element for determining whether the Human Rights Act is violated, which position is set forth at page 44 of Langley's Brief.

Respondents at page 15 of their Answer erroneously rely on the statement of the Commission that:

> "'We are not convinced that the fact that one 62 year old was forced to retire and another 62-year old was allowed to continue is evidence of 'age' discrimination.' RC 1474 This finding is a factual finding."

This is an erroneous finding as a matter of law. This is not a sufficient legal reason to reject the evidence of disparate treatment regarding Sanchez. There are five acts of disparate treatment involved in this case. In all of them, the disparate treatment and discrimination involve the wrongful administration of the mandatory retirement system. Respondents are silent on how many disparate treatment incidents Respondents claim need be proved against the common employer, Secretary of State. If four were proved, would the Commission require five? If five were proved, would the Commission

require ten? Respondents do not say, but the Human Rights Act does say-its provisions do not require more than one incident of disparate treatment. The Human Rights law should have been followed by the Human Rights Commission—because it only took one act of discrimination to dispose of Langley, and the contrast in the treatment of Langley compared to Sanchez is undeniable. In fact, the Administrative Law Judge held at pages 20 and 21 of the Recommended Order and Decision:

> " ... the record reflects that Sanchez would have satisfied all requirements for the forced retirement provision of Article 29 (i.e. over 62 years of age and 'creditable service date' of August 1, 1993) on August 1, 1993. ...Respondent has not explained why it did not insist that Sanchez retire at the earliest moment after having -Met all of the requirements for forced retirement under the terms of the 1991 collective bargaining agreement in August of 1993, while it required Complainant to retire a mere four days after Complainant had met all of the criteria for forced retirement under the 1988 collective agreement." (Emphasis added) (RC 904, 905) (A 20, 21)

This one instance was as devastating to Langley as if there had been ten Sanchezes—if Langley had received the same treatment as the one Sanchez, Langley would never have been forced to retire.

VI.

RESPONDENTS FAILED TO JUSTIFY THE COMMISSION'S INTERPRETATION OF THE 1987 AMENDMENT TO THE HUMAN RIGHTS ACT

Respondents at page 15of their Answer state that Langley apparently argues that the Human Rights Act remained unchanged by the 1987 Amendment. This is not the position of Langley regarding the proper interpretation of the 1987 Amendment which position is set forth at pages 23 through 25 of Langley's Petition for Rehearing, which position Respondents have not refuted. Also, Respondents' position was refuted by Langley in Section IV above at pages 14 through 15.

CONCLUSION

WHEREFORE, Petitioner-Appellant, John D. Langley, respectfully prays this Honorable Court:

To reverse the Illinois Human Rights Commission's final, appealable Order and Decision entered April 23, 1999 and remand the case to the Illinois Human Rights Commission with directions to enter an Order and Decision granting Petitioner-Appellant Complainant, John D. Langley, the relief established by the evidence, including reinstatement to his position as Secretary of State investigator, reassignment to the Mt. Vernon, Illinois area, payment of back and future wage loss, and reinstatement of the perquisites of his position and his attorney's fees.

James B. Wham #02995530
Wham & Wham Attorneys
212 East Broadway
Post Office Box 549
Centralia, Illinois 62801
(618) 532-5621
s/James B. Wham
James B. Wham #02995530

APPENDIX Q

[Filed JUL 1 0 2001]
NO. 91905

IN THE
SUPREME COURT OF THE
STATE OF ILLINOIS

PETITION FOR LEAVE TO APPEAL FROM THE
APPELLATE COURT OF ILLINOIS,
FIFTH DISTRICT 5-99-0336

THERE HEARD ON PETITION FOR REVIEW OF
ORDER OF THE ILLINOIS
HUMAN RIGHTS COMMISSION

NO. 1991SA0096

JOHN D. LANGLEY,
Petitioner,

VS.

THE ILLINOIS SECRETARY OF STATE,
ILLINOIS HUMAN RIGHTS COMMISSION, and
ILLINOIS DEPARTMENT OF HUMAN RIGHTS,
Respondents.

PETITION FOR LEAVE TO APPEAL

JAMES B. WHAM
WHAM & WHAM ATTORNEYS
212 East Broadway
Post Office Box 549
Centralia, Illinois 62801
(618) 532-5621
ATTORNEY FOR PETITIONER
JOHN D. LANGLEY

ORAL ARGUMENT REQUESTED

ARGUMENT

A.

THE ISSUE OF EQUAL PROTECTION AIM DISPARATE TREATMENT

The Appellate Court, after granting Petitioner's Petition for Rehearing, erroneously refused to change its Rule 23 Order and thus ignored the Petition for Rehearing attached hereto as an Appendix. (A 12-38)

Nothing in the Human Rights Act precluded consideration by the Commission of Langley's Equal Protection rights, nor do the cases cited in the Appellate Court's Rule 23 Order at page 6 (A 11) support such position. None of those cases involve the equal protection issue or the Human Rights Commission's subject matter jurisdiction.

The legislature's failure to specifically grant to the Commission power to enforce Equal Protection Rights did not preclude the Commission from exercising its inherent power and duty to consider and enforce Equal Protection Rights of parties in determining cases of disparate treatment and age discrimination, any more than the non-specification of the Fifth Amendment by the Legislature prevented the Commission from considering and enforcing Fifth Amendment rights of parties if raised before it. These powers and duties of the Human Rights Commission are inherent in the very creation of the Commission by the Legislature and do not require specification of such powers.

Siddens v. Industrial Commission, 304 Ill.App.3d 506, 286 Ill.Dec. at 208, cited by the Appellate Court

specifically recognizes that courts and agencies have inherent powers.

The Human Rights Commission, itself, cannot avoid this inherent power and duty by simply stating as set forth in the Commission's Order that, "no one has authorized us to enforce the Equal Protection clause of the constitution.. . (Commission's Order and Decision pg. 9) (A 72)

There is no case that supports the Human Rights Commission's avoidance of its duty to consider and enforce Equal Protection Rights.

Just as subject matter jurisdiction cannot be created by agreement, neither can subject matter jurisdiction be disclaimed, ignored and avoided by any commission or any court.

It is a matter of general importance that this question be determined now so that the Commission and the Courts in the future cannot erroneously avoid and ignore the duty to determine equal protection matters.

Page 6 of the Appellate Court's Rule 23 Order states that, ... we have no jurisdiction to consider them [Langley's equal protection rights] in Langley's appeal of the order of the Commission". (A 11) This holding by the Appellate Court, as well as the Commission's holding, also overlooks the Equal Protection clause of the Constitution of Illinois (1970) being Article I, Sec. 2, and the constitutional commentary, Smith-Hurd Illinois Compiled Statutes Annotated, Article I, Sec. 2, Constitution of 1970 cited at page 5 of the Petition for Rehearing (A 17) , which reads as follows and requires the Human Rights Commission and Appellate

Court to consider the equal protection rights of Langley:

> "The Equal Protection clause of the Constitution of Illinois (1970) being Article I, Sec. 2, and the constitutional commentary, Smith-Hurd Illinois Compiled Statutes Annotated, Article I, Sec. 2, Constitution of 1970 at page 64 reads in part as follows:
>
> > "The guarantee for every person of equal protection of the laws was added in the 1970 Constitution. The addition gives formal expression to a principle already well recognized and applied in Illinois. The Illinois courts have frequently held that persons shall not 'be denied equal protection of the law' as a matter of State law, See, e.g., Heimgaertner v. Benjamin Elec. Mfg. Co., 6 Ill.2d 152, 128 N.E.2d 691 (1955); Schuman v. Chicago Transit Authority, 407 Ill. 313, 95 N.E.2d 447 (1950); People v. Gordon, 274 Ill. 462, 113 N.E.2d 864 (1916). Of course, the Federal equal protection clause also applies within the State." (Emphasis added) (A 17)

The Appellate Court's Rule 23 Order overlooked *Thakkar v. Wilson Enterprises, Inc.*, 120 Ill.App.3d 878, 458 N.E.2d 985, 76 Ill.Dec. 331, which states at page 333:

> "A review of the detailed legislative scheme of the Human Rights Act persuasively suggests that the General Assembly intended for it to be the preemptive vehicle for the resolution of employment discrimination cases in Illinois."

The Appellate Court, as well as the Human Rights Commission, has overlooked the gross prejudice resulting to Langley from the non-consideration of his equal protection rights. Where, if not here, can Langley receive judicial consideration of these equal protection claims against the Illinois Secretary of State for the discriminatory treatment he received?

The Appellate Court overlooked the recent United States Supreme Court decision, namely, *Kimel v. Florida Board of Regents*, 528 U.S. 62, 145 L.Ed.2d 522, 120 S.Ct. 631, (January 11, 2000) which held that the state could not be sued by a state employee in the Federal Court in an age discrimination case by reason of the Eleventh Amendment immunity. (Cited and quoted at page 6 of the Petition for Rehearing. (A 18)

Stevens v. Illinois Department of Transportation, 210 F. 3d 732 (7th Cir. April 11, 2000) recognizes that suits against departments of state government are equivalent to suits against a state. Langley is, thus, precluded from bringing this case against the Illinois Secretary of State in the Federal Court under the holding of *Kimel*, Langley likewise, cannot file such case against the Secretary of State in the Circuit Court. The only proper forum for Langley's case is where it is now.

When Langley was singled out as the only Secretary of State investigator ever forced against his will to retire upon reaching 62 years of age, while permitting DiSabato, Sandona and Wood to continue working long after reaching that age, such disparate action violated the Human Rights Act which prohibits age discrimination and the Equal Protection rights of Langley under the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Constitution of

the State of Illinois (1970). There is no doubt but that it was unequal treatment. There was no rational nonarbitrary reason that could be or was asserted in support of such State action by the Secretary of State. In fact, the Administrative Law Judge in the Recommended Order and Decision recognized that:

"... Complainant is correct that Respondent has not explained why, if the ranked officers were not forced to retire pursuant to Article 29 of the collective bargainging agreement Respondent did not forcibly retire these officers pursuant to section 2-115 of the Motor Vehicle Act when they turned 60 years old." (emphasis added) (RC 905) (A 5 9)

No one—not the Respondent, not the Commission and not the Appellate Court can point to any valid excuse or non-arbitrary reason for such discriminatory action against Langley.

In *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982) the Court held at pages 522-523:

> "Equal protection demands at a minimum that a municipality must apply its laws in a rational and nonarbitrary way. Yick Wo v. Hopkins,... This requires a showing that its application of the law 'rationally furthers some legitimate, articulated state purpose and therefore does not constitute invidious discrimination. I ... We have consistently applied these principles which are at the heart of the equal protection guarantee to protect against arbitrary government conduct. " (emphasis added)

The action of the Secretary of State was "arbitrary government conduct." There is no showing that this

discrimination against Langley "rationally furthers some legitimate, articulated state purpose" in applying mandatory age retirement requirement against him and against none of the others.

In *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973), at page 618 the Court stated:

> "... The promise of equal protection of the laws is not limited to the enactment of fair and impartial legislation, but necessarily extends to the application of these laws."

The issue here involves determining whether there was equal application and enforcement of the statute and the contract. The same issue would be presented if both ranked and non-ranked investigators were under contracts requiring non-ranked investigators to retire at 62, but ranked investigators to retire at 60. If such contractual provision was not enforced as to ranked investigators but was only enforced as to non-ranked investigators, equality, fairness and impartiality required by the equal protection clause would not have been complied with.

Such would also be the case had the statute provided for ranked investigators to retire at 60 years of age, the non-ranked investigators to retire at 62 years of age and then the law enforced by the Secretary against only the non-ranked investigators.

In *Northwestern University v. Evanston*, 221 Ill.App.3d 893, 582 N.E.2d 1251, 164 Ill.Dec. 307 at 310 the Court stated:

> "Under principles of equal protection the classification is invalid if it is arbitrary and without a reasonable basis."

The Secretary of State's administration of the mandatory age retirement system applicable to both ranked and non-ranked investigators, in not enforcing mandatory age retirement on the ranked investigators while enforcing mandatory age retirement on non-ranked investigators constituted an unreasonable and arbitrary classification violative of the equal protection clause.

Both the ALJ and the Commission acknowledged that:

> "... the Commission has always considered disparate treatment among similarly situated employees in order to determine whether there has been any violation of the Human Rights Act. (See, for example, Loyola University v. Human Rights Com'n., 149 Ill.App.3d 8, 500 N.E.2d 639, 102 Ill.Dec. 746, (1st Dist. , 3d Div. , 1986) .) 11 (A 56, 57)

Disparate treatment is the issue and the Human Rights Commission is the proper forum to give recompense for such disparate treatment received by Langley from the office of Secretary of State.

As stated in the order entered in this cause April 16, 1992:

> "If in the instant case, the employer discriminated, against Complainant on the basis of his age, while treating similarly situated employees differently, under the foregoing analysis the Commission would appear to have jurisdiction." (RC 95, 102)

There is no case in Illinois or elsewhere authorizing the mandatory age retirement requirement to be enforced against only one of the employees, while the common employer allowed all the rest of the similarly

situated employees who were likewise under the mandatory age retirement requirement to work as long as they wanted contrary to the mandatory retirement age applicable to them. Both the Appellate Court and the Commission erred in failing to recognize and consider Langley's valid claims and render the relief prayed and proved by the undisputed evidence.

B.

THE INTERRELATED ISSUES OF THE 1987 AMENDMENT TO THE HUMAN RIGHTS ACT, THE ILLINOIS VEHICLE CODE, THE SUPREME COURT DECISION IN THE MIKUSCH CASE AND THE CEASE AND DESIST ORDER

The Appellate Court overlooked and refused to consider Langley Is claims based on the Cease and Desist Order entered *In the Matter of: Department of Human Rights, et al., Complainants, and State of Illinois, Office of the Secretary of State, Respondent*, Charge No. 1984 CF 9002, ALS No. 1164 (L) , 18 Ill. HRC Rep. 51 entered August 28, 1985. The Cease and Desist Order contained the held at pages 20 and 21 of the Recommended Order and Decision:

> "...the record reflects that Sanchez would have satisfied all requirements for the forced retirement provision of Article 29 (i.e. over 62 years of age and 'creditable service date' of August 1, 1993) on August 1, 1993. ...Respondent has not explained why it did not insist that Sanchez retire at the earliest moment after having met all of the requirements for forced retirement under the terms of the 1991 collective bargaining agreeement in August of 1993.

> while it required Complainant to retire a mere four days after Complainant had met all of the criteria for forced retirement under the 1988 collective bargainingfagreement." (Emphasis added) (RC 904, 905) (A 58, 59)

This one instance of disparate treatment established by undisputed facts was as devastating to Langley as if there had been ten Sanchezes permitted to keep working. If Langley had received the same treatment as did Sanchez—Langley would never have been forced to retire at age 62. This is age discrimination beyond doubt and it cannot be explained away and should not have been ignored by the Commission and the Appellate Court.

CONCLUSION AND PRAYER FOR RELIEF

From the foregoing, it is apparent that any way this case is examined, turned and twisted, whether on Respondent's theory that age 60 is the date investigators were forced to retire, or whether it was age 70, as decreed by the Cease and Desist Order of the Commission and as determined by the Supreme Court in *Mikusch*—the result is the same—age discrimination and disparate treatment has been clearly established by the undisputed facts. And this is the proper and only forum to afford the relief requested and proved by Langley.

By this erroneous decision of the Appellate Court, the Human Rights Commission has been judicially authorized, both now and in the future, to erroneously abdicate its Power and duty to enforce Equal Protection Rights under the Fourteenth Amendment to the Constitution of the United States and Article 1, Section II of

the Constitution of Illinois (1970) in matters coming before the Commission under the provisions of the Illinois Human Rights Act. This decision should not stand as the law of Illinois.

Petitioner respectfully requests that his Petition for Leave to Appeal be granted for the reasons set forth in the Petition and the decision of the Appellate Court should be reversed and Langley be award the relief requested in this case.

ORAL ARGUMENT REQUESTED.

Respectfully submitted,
Wham, & Wham Attorneys
212 East Broadway
Post Office Box 549
Centralia, Illinois 62801
(618) 532-5621
Attorneys for Petitioner,
John D. Langley
s/James B. Wham
James B. Wham #02995530

APPENDIX R

NO. 91905

**IN THE
SUPREME COURT OF THE
STATE OF ILLINOIS**

PETITION FOR LEAVE TO APPEAL FROM THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT 5-99-0336

THERE HEARD ON PETITION FOR REVIEW OF ORDER OF THE ILLINOIS HUMAN RIGHTS COMMISSION

NO. 1991SA0096

JOHN D. LANGLEY,
Petitioner,

VS.

THE ILLINOIS SECRETARY OF STATE, ILLINOIS HUMAN RIGHTS COMMISSION, and ILLINOIS DEPARTMENT OF HUMAN RIGHTS,
Respondents.

MOTION FOR LEAVE TO FILE

MOTION FOR RECONSIDERATION OF THE SUPREME COURT'S DENIAL OF PETITIONER'S PETITION FOR LEAVE TO APPEAL

Now comes Petitioner, John D. Langley, by James B. Wham, Wham & Wham, his attorney, and moves this Honorable Court to enter an Order granting Petitioner leave to file Motion for Reconsideration of the Supreme

Court's Denial of Petitioner's Petition for Leave to Appeal in the above cause. As grounds for this Motion Petitioner states as follows:

On the 3rd day of October 2001, This Honorable Court denied the Petitioner's Petition for Leave to Appeal without comment and ordered that the Mandate of this Court will issue to the Appellate Court of the Fifth District of Illinois on October 25, 2001.

The questions of general importance involved herein call for this Court to reconsider its review of the Appellate Court's decision and its denial of the Petition for Leave to Appeal, and to render a published opinion in favor of Petitioner, John D. Langley, including this Court's pronouncement that there is a forum provided by the State of Illinois which will hear the Complaint of Langley that his equal protection rights have been violated.

It is obvious from a reading of the Appellate Court's Rule 23 Order that both the Human Rights Commission and the Appellate Court have erroneously refused to hear and consider Langley's claims that the Secretary of State violated his equal protection rights under the Fourteenth Amendment to the Constitution of the United States and Article 1, Section 2 of the Constitution of Illinois (1970).

This refusal to hear and consider these issues by both the Human Rights Commission and the Appellate Court was based on the erroneous concept expressed by the Appellate Court that the Human Rights Act "does not grant the Commission the power to enforce ... or hear Constitutional claims such as a claim of the violation of equal protection rights." The Appellate Court then con-

cluded by stating, "Therefore, we conclude that the Commission was correct in refusing to hear Langley's claims based on ... equal protection rights. We do not make any findings as to the validity of any of these claims, but, rather, conclude that we have no jurisdiction to consider them in Langley's appeal of the Order of the Commission." (Rule 23 Order, Petition for Leave to Appeal, A 10, 11)

The Appellate Court in its Rule 23 Order and this Court in denying Langley's Petition for Leave to Appeal overlooked the United States Supreme Court's decision in *Kimel v. Florida Board of Regents*, 528 U.S. 62, 145 L.Ed.2d 522, 120 S.Ct. 631, (January 11, 2000) which held that the State could not be sued by a State employee in the Federal Court in an age discrimination case by reason of the Eleventh Amendment immunity. The Court in Kimel held that:

> "Our decision today does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers. We hold only that, in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals. State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union.* Those avenues of relief remain available today, just as they were before this decision."

In the footnote referred to above at 145 L.Ed.2d, page 547, is cited the various statutes in the many states, including Ill.Comp.Stat., ch. 775,§5/1-101 et seq. (1998) [the Illinois Human Rights Act]. This decision of the United States Supreme Court clearly shows the fallacy

of Respondents' contention that "Langley is in the wrong forum." (Resp. Br. 22) It is clear that Langley could not at the present time pursue this claim in the Federal Court under the *Kimel* ruling and that this is the correct forum.

Stevens v. Illinois Department of Transportation, 210 F.3d 732 (7th Cir. April 11, 2000) recognizes that suits against departments of state government are equivalent to suits against a state. Langley is, thus, precluded from bringing this case against the Illinois Secretary of State in the Federal Court under the holding of *Kimel*.

It has been Langley's position throughout this case that the legislature created the Human Rights Commission as the forum to resolve employment discrimination cases in Illinois. As stated by the Court in *Thakkar v. Wilson Enterprises, Inc.*, 120 Ill.App.3d 878, 458 N.E.2d 985, 76 Ill.Dec. 331, at 333:

> "A review of the detailed legislative scheme of the Human Rights Act persuasively suggests that the General Assembly intended for it to be the preemptive vehicle for the resolution of employment discrimination cases in Illinois."

This position is in accord with the United States Supreme Court's *Kimel* case holding.

There is nothing in the Human Rights Act which precluded consideration by the Commission of Langley's Equal Protection rights, nor do the cases cited in the Appellate Court's Rule 23 Order at page 6 (A 11, Petition for Leave to Appeal) support such position. None of those cases involve the equal protection issue or the Human Rights Commission's subject matter jurisdiction.

The fact that the legislative enactment did not specifically state that the Commission had power and jurisdiction to enforce Equal Protection Rights preclude the Commission from doing so any more than did the non-specification of power to consider and enforce Fifth Amendment rights preclude the Commission from doing so when raised before it. These powers and duties of the Human Rights Commission are inherent in the very creation of the Commission by the Legislature.

Siddens v. Industrial Commission, 304 Ill.App.3d 506, 286 Ill.Dec. at 208, cited by the Appellate Court specifically recognizes that courts and agencies have inherent powers.

The Human Rights Commission, itself, cannot avoid this inherent power and duty by simply stating as set forth in the Commission's Order that, "No one has authorized us to enforce the Equal Protection clause of the constitution... 11 (Commission's Order and Decision pg. 9) (Petition for Leave to Appeal, A 72)

There is no case that supports the Human Rights Commission's avoidance of its duty to consider and enforce Equal Protection Rights.

Just as subject matter jurisdiction cannot be created by agreement, neither can subject matter jurisdiction be disclaimed, ignored and avoided by any Commission or any Court.

Even the Legislature itself, could not by its own enactment prevent the Commission or any Court from considering the Equal Protection clauses of the Fourteenth Amendment and the Constitution of Illinois. Such legislative action would exceed the powers of the

Legislature and constitute a violation of the State and Federal Constitutions.

It is a matter of general importance that this question be determined now by this Court so that the Commission and the Courts in the future will not erroneously avoid and ignore the duty to hear and determine equal protection matters as did the Human Rights Commission and the Appellate Court in this case.

Page 6 of the Appellate Court's Rule 23 Order states that, ... we have no jurisdiction to consider them [Langley's equal protection rights] in Langley's appeal of the order of the Commission". (Petition for Leave to Appeal, A 11) This holding by the Appellate Court, as well as the Commission's holding, specifically ignores the Equal Protection clause of the Constitution of Illinois (1970) being Article I, Sec. 2. In the constitutional commentary, Smith-Hurd Illinois Compiled Statutes Annotated, Article I, Sec. 2, Constitution of 1970 it is stated:

> "The guarantee for every person of equal protection of the laws was added in the 1970 Constitution. The addition gives formal expression to a principle already well recognized and applied in Illinois. The Illinois courts have frequently held that persons shall not 'be denied equal protection of the law' as a matter of State law,, See, e.g., *Heimgaertner v. Benjamin Elec. Mfg. Co.*, 6 Ill.2d 152, 128 N.E.2d 691 (1955); *Schuman v. Chicago Transit Authority*, 407 Ill. 313, 95 N.E.2d 447 (1950); *People v. Gordon*, 274 Ill. 462, 113 N.E.2d.864 (1916). Of course, the Federal equal protection clause also applies within the State." (Emphasis added) (A 17) (Petition for Leave to Appeal, A 10)

Thus, the provisions of the Illinois Constitution itself requires the Human Rights Commission, the Appellate Court and this Court to consider the Equal Protection Rights of Langley by providing him a hearing on the issue and a decision on that issue.

This Court, the Appellate Court, as well as the Human Rights Commission, have thus far overlooked the gross prejudice resulting to Langley from the non-consideration of his equal protection rights. There must be some forum in Illinois wherein Langley can receive judicial consideration of these equal protection claims against the Illinois Secretary of State for the discriminatory treatment he received. And this is now the only available forum.

The decision by the Appellate Court and the Human Rights Commission denying Langley a hearing is founded on nothing more than the Human Rights Commission's unilateral declaration, with no authority supporting it, that the Commission has no jurisdiction to hear and decide this claim of Langley's equal protection claims. Thus far, both the Appellate Court and this Court have acquiesced in the Human Rights Commission's erroneous rejection of its own jurisdiction. Such a vital decision should not rest on the Commissions, one-line rejection of its own jurisdiction based on no supporting authority.

The Petition for Leave to Appeal sets forth the undisputed facts and the basis upon which Langley's rights have been violated contrary to the Equal Protection clause of the Fourteenth Amendment and Article 1, Section 2 of the Constitution of Illinois (1970). Thus far these undisputed facts and issues have been ignored, overlooked or misapprehended by the Appellate Court in its Rule 23 Order, the Human Rights Commission

and this Court in its denial of the Petition for Leave to Appeal.

This refusal to accord Langley a hearing on these issues constitutes a violation of not only Langley's Equal Protection Rights, but also his rights to substantive and procedural due process as well.

If the Appellate Court's Rule 23 Order ends this case now, thus denying Langley even the opportunity to be heard on this Equal Protection Issue, then the two most significant constitutional hallmarks-Equal Protection and Due Process—mean nothing more than any other unfulfilled commitment.

One thing is certain. Regardless of the determination by the Commission and the Appellate Court disclaiming jurisdiction to hear and consider the Equal Protection Issues, this Court, the highest judicial tribunal in the State, without question, does have jurisdiction to hear and determine the Equal Protection Issues in this case. The undisputed facts are in the record. The issues have been presented by Langley throughout the case. There has been no waiver of Constitutional issues by him. The power and jurisdiction of this Court to hear and determine the issues is unrestricted by Statute, by the Commission, by the Constitution or otherwise. And now is the time for Langley's claims to be heard and determined if they are ever to be heard and determined. There is no legitimate objection anyone can raise against such a hearing and determination at this time and by this Court.

In the course of failing to consider and hear Langley's claim that I the Secretary of State violated his Equal Protection Rights under the Fourteenth Amendment

and under Article I, Section 2 of the Constitution of Illinois (1970) as stated in Langley's Motion for Leave to File Motion for Reconsideration of Petitioner's Petition for Leave to Appeal, the Appellate Court and the Human Rights Commission and this Court overlooked the following undisputed facts and contentions of Langley as set forth in his Petition for Rehearing:

1. That on August 14, 1990, the Secretary of State was the common employer of John D. Langley, a non-ranked investigator, age 62 and ranked investigators Columbus DiSabato, age 67; Robert Sandona age 64; and Raymond Wood age 65. (Petition for Rehearing, pgs. 7, 9)

2. As such common employer, the Secretary of State was charged with administering a mandatory age retirement system applicable to all Secretary of State investigators, both ranked and non-ranked, with fairness and impartiality, as required by the Equal Protection clause of the Fourteenth Amendment to the United States Constitution and Article 1, Section 2 of the Illinois Constitution (1970) (Petition for Leave to Appeal, pg. 13)

3. The only reason the Secretary of State gave for forcing Langley to retire on August 14, 1990 against his will at age 62 was the Collective Bargaining Agreement, which provided in part as follows: "All sworn personnel holding the rank of investigator shall retire from service with the department of police upon reaching the age 62 or upon completing 20 years of active duty, whichever occurs later." (Rule 23 Order, Petition for Leave to Appeal, A 7)

4. DiSabato, Sandona and Wood as ranked investigators were not covered by the Collective Bargaining Agreement. Their mandatory retirement age was governed by the provisions of the Motor Vehicle Code which provided that: "No person may be retained in service as an investigator under this section after he reaches 60 years of age." (625 ILCS 5/2-115, West 1998) (Rule 23 Order, Petition for Leave to Appeal, A 7) Yet, in spite of this statutory requirement, the Secretary of State permitted them to continue working while at the same time Langley was required by the Secretary to retire.

5. There was no rational non-arbitrary reason asserted by the Secretary of State in support of such unequal, disparate and discriminatory treatment. The Administrative Law Judge in the Recommnded Order and Decision recognized that fact as follows:

"... Complainant is correct that Respondent has not explained why. if the ranked officers were not forced, to retire puirsuant to Article 29 of the-collective bargaining agreement, "I Respondent did not forcibly retire these officers pursuant to section 2-115 of the Motor Vehicle Act when they turned 60 years old." (Emphasis added) (RC 905) (A 59)

No one can point to any valid excuse or non-arbitrary reason for such discriminatory action against Langley. (Petition for Leave to Appeal, pgs. 11, 12)

6. Another non-ranked investigator, Raymond Sanchez, for no legitimate reason, also received more favorable treatment by the Secretary of State than did Langley. The Administrative Law Judge at pages 20 and 21 of the Recommended Order and Decision found that:

" ... the record reflects that Sanchez would have satisfied all requirements for the forced retirement provision of Article 29 (i.e. over 62 years of age and 'creditable service date' of August 1, 1993) on August 1, 1993. ...Respondent has not explained why it did not insist that Sanchez retire at the earliest moment after having met all of the requirments for forced retirement under the terms of the 1221 collective bargaining agreement in August of 1923, while required Complainant to retire a-mere four days after Comp;ainant had met all of the criteria for forced retirement under the 1988 collective bargaining agreement." (Emphasis added) (RC 904, 905) (A 58, 59) (Petition for Leave to Appeal, pgs. 18, 19)

7. Had Langley received the same treatment from the Secretary of State as did Sanchez, Langley would never have been forced to retire at age 62. (Petition for Leave to Appeal, pg. 19)

8. In addition to the foregoing disparate and discriminatory treatment, at the time of Langley's forced retirement there was in full force and effect a Cease and Desist Order which had been entered by the Human Rights Commission *In the Matter of: Department of Human Rights, et al., Complainants, and State of Illinois, Office of the Secretary of State, Respondent*, Charge No. 1984 CF 9002, ALS No. 1164 (L), 18 Ill. HRC Rep. 51 which Order had been entered August 28, 1985. The Cease and Desist Order contained the provision stating:

"That the Respondent is ordered to cease and desist forthwith from taking any measures henceforth to compel or coerce Complainants or any others it may employ as investigators to retire

before they have attained any age younger than 70 years." (RC 871-873) (A 79-81) (Emphasis added) (Petition for Rehearing, pg. 14) (Petition for Leave to Appeal A 26)

Although Langley was not specifically named in said Cease and Desist Order he, a nonranked investigator, was entitled to the same protection by the Cease and Desist Order as was Robert Sandona, a ranked investigator, who was also not specifically named in the Cease and Desist Order. Sandona was 64 years of age at the time of Langley's forced retirement at age 62. They both came within the clause of the Cease and Desist Order applying to "any others it [the Secretary of State] may employ as investigators." (Petition for Leave to Appeal, pg. 15)

The Cease and Desist Order language is definite and specific that the Secretary can take no measures to compel or coerce investigators to retire before attaining age 70 years. (Petition for Rehearing, pg. 15) And that means that the Secretary of State was prevented by the Human Rights Cease and Desist Order from enforcing, against the will of Langley, the 62year age retirement requirement of the Collective Bargaining Agreement.

9. The Commission, the Appellate Court and this Court all overlooked the fact that since this Cease and Desist Order prohibited the Secretary of State from forcing DiSabato, Sandona and Wood to retire prior to reaching age 70, then that same Cease and Desist Order prohibited the Secretary of State from forcing Langley to retire against his will before reaching 70 years of age. The fact that some non-ranked investigators might wish to take advantage of the 62-year age retirement provision of the Collective Bargaining Agreement is

irrelevant to the issue regarding Langley who did not want to retire and should not have been required to retire against his will on August 14, 1990, anymore than any other investigator.

10. The Commission, the Appellate Court and this Court have misapprehended and ignored the fact that the passage of the 1987 Amendment to the Human Rights Act did not rescind the Human Rights Commission's Cease and Desist Order. Neither the Human Rights Commission nor the Appellate Court even addressed the question. Both Court and Commission ignored the existence of this Cease and Desist Order, which prevented forced retirement of all investigators prior to age 70 years. Moreover, the Amendment only permitted, but did not require other employers of law enforcement officers (who were not bound by such a Cease and Desist Order, as that which bound the Secretary of State) to enter into agreements establishing mandatory age retirement requirements. (Petition for Leave to Appeal, pg. 16)

11. The Appellate Court, the Commission and this Court misapprehended and overlooked the fact that the Human Rights Commission did have the power and jurisdiction to enforce its own Cease and Desist Order against the Secretary of State. The Human Rights Commission had done so since August 28, 1985, the date it entered such Cease and Desist Order. Nothing in the 1987 Amendment to the Human Rights Act rescinded that power and jurisdiction of the Human Rights Commission to enforce its existing Cease and Desist Order.

12. Paragraph G of the Amendment to the Human Rights Act (Section 2-104) provides that the Amendment shall not apply, "with respect to any cause of action

in affect prior to the effective date of the amndatory act of 198711 (Rule 23 Order, Petition for Leave to Appeal, A 7, A 8) (Ill.Rev.Stat. 1987 ch. 68, par. 2-104 (A 7, 8) (now see 775 ILCS 5/2-104 (A) (7) (West 1998)). Since Langley was an investigator for the Secretary of State and was included within the provisions of the Cease and Desist Order, which was still in effect on August 14, 1990, this paragraph G of the 1987 Amendment applied to him. Therefore, the Secretary of State was prohibited from requiring Langley to retire against his will under the provisions of the Collective Bargaining Agreement mandatory retirement provision of 62 years.

13. The Appellate Court, the Commission and this Court overlooked the fact that on the date of Langley's forced retirement, the Supreme Court had not yet decided the *Mikusch* case and did not render its decision until October 4, 1990 (138 111.2d 242). Prior to that date, the Appellate-Court on May 5, 1989 in the case of *Secretary of State vs. Mikusch*, 181 Ill.App.3d 431 had determined that the Motor Vehicle Code mandatory retirement age of 60 was the applicable law requiring mandatory retirement of Secretary of State investigators at age 60 years. The Cease and Desist Order of the Human Rights Commission was then in effect and was the only reason that DiSabato, Sandona and Wood could legally continue working after each had reached age 60. Each of them was more than 62 years of age on May 5, 1989, and the Commission's Cease and Desist Order was the only reason they could legally keep working as Secretary of State investigators on August 14, 1990, the date Langley was forced to retire against his will.

Langley was entitled to protection from forced retirement by that same Cease and Desist Order, yet the

Secretary of State wrongfully required him to retire against his will on August 14, 1990, in violation of the Cease and Desist Order. Langley was forced to retire immediately upon attaining age 62, while DiSabato, Sandona and Wood, all of whom were more than 64 years of age on that date, were all permitted by the Secretary of State to continue serving in accordance with the Cease and Desist Order. Thus, the disparate treatment of Langley based on age at the time of his discharge is apparent. (Petition for Leave to Appeal, pgs. 15, 16)

14. This Court in denying the Petition for Leave to Appeal overlooked these undisputed facts and positions of Langley and also overlooked the fact that there was no rational non-arbitrary reason which could be or ever was asserted by the Secretary of State in support of any legitimate reason for forcing Langley to retire, while at the same time allowing DiSabato, Sandona, Wood and Sanchez to continue serving.

There is no doubt but that the action of the Secretary of State was "arbitrary governmental conduct". There is no doubt that neither the Secretary of State nor anyone else made any showing or legitimate contention that this disparate treatment and discrimination against Langley, "rationally furthers some legitimate, articulated state purpose" in applying the mandatory age retirement provision applicable to him, while at the same time, not applying the mandatory age provision applicable to DiSabato, Sandona, Wood and Sanchez. Any attempt to justify such disparate and discriminatory treatment is nothing but an exercise of sophistry at its worst.

This Court overlooked the above factors and the cases cited by Petitioner at pages 12 and 13 of the Petition for Leave to Appeal, which cases clearly support Langley's position.

In *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982) the Court held at pages 522-523:

> "Equal protection demands at a minimum that a municipality must apply its laws in a rational and nonarbitrary way. *Yick Wo v. Hopkins,...* This requires a showing that its application of the law 'rationally furthers some legitimate, articulated state purpose and therefore does not constitute invidious discrimination.' We have consistently applied these principles which are at the heart of the equal protection guarantee to protect against arbitary gomernment conduct (emphasis added)

In *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973), at page 618 the Court stated:

> ... The promise of equal protection of the laws is not limited to the enactment of fair and impartial legislation, but necessarily extends to the application of these laws."

In *Northwestern University v. Evanston*, 221 Ill.App.3d 893, 582 N.E.2d 12511, 164 Ill.Dec. 307 at 310 the Court stated:

> "Under principles of equal protection the classification is invalid if it is arbitrary and without a reasonable basis."

This Court in denying the Petition for Leave to Appeal overlooked the fact that there is no reasonable basis

cited by the Secretary of State, the Commission or the Appellate Court justifying the forced retirement of Langley against his will under the terms of the Collective Bargaining Agreement, while not forcing DiSabato, Sandona and Wood to retire under the provisions of the statute applicable to them.

This is no different issue than would be involved if both ranked and non-ranked investigators were under the same contract requiring non-ranked investigators to retire at 62 and ranked investigators to retire at 60. If such a contractual provision was not enforced as to ranked investigators, but was only enforced as to non-ranked investigators, then equality, fairness and impartiality required by the Equal Protection clause would not have been complied with.

The issue is the same as would be the case had a statute required ranked investigators to retire at 60 years of age and the non-ranked investigators required to retire at 62 years of age. Enforcing the applicable statutory provision of mandatory age retirement against only the non-ranked investigators, while at the same time not enforcing the statutory provision applicable to ranked investigators would constitute the same violation of Equal Protection Rights as was done to Langley in the instant case. (Petition for Leave to Appeal, pg. 13)

The Appellate Court's Rule 23 Order reflects that both the Human Rights Commission and the Appellate Court erroneously ignored and refused to hear and consider Langley's claims that the Secretary of State violated his Equal Protection Rights under the Fourteenth Amendment to the Constitution of the United States and Article I, Section 2 of the Constitution of Illinois (1970).

This Court in denying the Petition for Leave to Appeal overlooked such erroneous refusal of the Appellate Court and the Human Rights Commission to hear and consider these claims of Langley.

Not only did the Appellate Court ignore, overlook and misapprehend the above issues, all of which were based on undisputed facts, but the Appellate Court also misapprehended Langley's position concerning the mandatory age retirement provisions of the Illinois Motor Vehicle Code. At page 6 of the Rule 23 Order, it is stated: "Therefore, we conclude that the Commission was correct in refusing to hear Langley's claims based on the enforcement of the Illinois Vehicle Code... "

It has never been Langley's position that the Illinois Vehicle Code should be enforced. It is Langley's position that inasmuch as the Secretary of State saw fit to not require DiSabato, Sandona and Wood to retire upon reaching 60 years of age, as required by the Motor Vehicle Code, which then applied to them as ranked Secretary of State investigators on August 14, 1990, it was disparate and discriminatory treatment of Langley by the Secretary of State to require Langley as a non-ranked Secretary of State investigator to retire against his will at age 62 under the provisions of the Collective Bargaining Agreement.

The Appellate Court also misapprehended Langley's position with reference to the Collective Bargaining Agreement wherein it stated at page 6 of the Rule 23 Order that, "We conclude that the Commission was correct in refusing to hear Langley's claims based on ... the Collective Bargaining Agreement... 11 Here again, the Appellate Court misapprehended Langley's disparate and discriminatory treatment claims. Langley never

contended that the Collective Bargaining Agreement be enforced. Langley contends that it was discriminatory and disparate treatment to enforce its provisions against him, while at the same time permitting DiSabato, Sandona and Wood to continue serving beyond the age provision of the Motor Vehicle Code pertaining to them.

It is obvious from the contents of the Rule 23 Order that unless this Court grants Petitioner's Petition for Leave to Appeal and permits Petitioner to appear and present Langley's claims referred to above, which have thus far been ignored, the State of Illinois will have provided no forum in which Langley has an adequate opportunity to raise his Federal Constitutional claims under the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States for consideration.

CONCLUSION

There is no case in Illinois or elsewhere authorizing a mandatory age retirement requirement to be enforced by a common employer against only one of the employees while the same common employer allows all the rest of the similarly situated employees, who are, likewise, bound by a mandatory age retirement requirement, to work as long as they desire. No governmental officer, including the Secretary of State, should be permitted to engage in such unrestrained bureaucratic improper selectivity with impunity.

It is apparent that whether the age of 60 is the date that ranked investigators were forced to retire, or whether the required retirement age for all Secretary of State investigators was 70 years, as provided by the Cease and Desist Order of the

Commission, there is no legitimate dispute that age discrimination and disparate treatment have been clearly established by the undisputed facts. Thus far, these facts have been ignored, overlooked or misapprehended by the Appellate Court, the Commission and this Court in denying the Petition for Leave to Appeal.

Therefore, Petitioner, John D. Langley, respectfully requests that this Honorable Court grant Petitioner the right to file his Motion for Reconsideration of the Supreme Court's Denial of Petitioner's Petition for Leave to Appeal and to stay the issuance of the Mandate, heretofore referred to on the first page of this Motion.

A proposed Order is submitted along with this Motion. Also, the proposed Motion for Reconsideration of the Supreme Court's Denial of Petitioner's Petition for Leave to Appeal and a proposed Order relating to that Motion are submitted herewith.

Respectfully submitted,
Wham & Wham Attorneys
212 East Broadway
Post Office Box 549
Centralia, Illinois 62801
(618) 532-5621
Attorneys for Petitioner,
John D. Langley
s/James B. Wham
James B. Wham, #02995530

APPENDIX S

[Recieved May 28, 1997]
STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

CHARGE NO: 1991SA 0096
EEOC NO: 21B903376
ALS NO: S-5288

IN THE MATTER OF:

JOHN D. LANGLEY,
Complainant

and

ILLINOIS SECRETARY
OF STATE,
Respondent.

AMENDMENT TO THE AMENDED COMPLAINT

Now comes Complainant, John D. Langley, by Wham & Wham, his attorneys, and for his Amendment to the Amended Complaint adds thereto paragraph E. 1. (e) as follows:

E. 1. (e) Raymond A. Sanchez, a Secretary of State nonranked investigator, was born January 8, 1930. He is now 67 years of age and is still employed as a Secretary of State nonranked investigator.

His age as of October 24, 1993 was 63.74 years of age and his work years as Secretary of State Investigator was 21 years, 5 months and 21 days, and that on October 24, 1992 his age was 62.74 years and his work years as a Secretary of State Investigator was 20 years, 5 months

and 21 days. The Secretary of State has permitted Investigator Raymond A. Sanchez to serve as Secretary of State Investigator and has refused to permit Complainant, John D. Langley, to serve as a Secretary of State

Investigator at any time after August 14, 1993, although having been requested to do so in light of the foregoing facts and by letter of May 23, 1997, a copy of which is attached hereto.

Wham & Wham Attorneys
212 East Broadway
Post Office Box 549
Centralia, Illinois 62801
(618) 532-5621
Attorneys for Complainant
John D. Langley
s/ James B. Wham
James B. Wham #02995530
John D. Langley
3112 Peach Street
Mt. Vernon, Illinois 62864
(618) 242-7522

APPENDIX T

May 23, 1997

George H. Ryan,

Secretary of State
State of Illinois
Capitol Building
Room 213
Springfield, IL 62756

Dear Secretary Ryan:

Please accept this letter as my request for reinstatement to my position of investigator for the Secretary of State from which position I was forced to retire on August 14, 1990 against my will for the sole reason of the 62 year age provision contained in Article 29 of the 1988 Collective Bargaining Agreement between the Office of the Secretary of State and the Fraternal Order of Police Lodge #95.

Upon being required to retire against my will, I filed a Complaint now pending before the Human Rights Commission. This was filed on August 29, 1990 seeking reinstatement and recompense for back pay, etc. This case is presently being heard by the Human Rights Commission Administrative Law Judge in Springfield, which Hearing commenced on May 8th and is presently scheduled to resume on May 28, 1997.

During the Hearing, the records of the Secretary of State Investigator Raymond Sanchez were admitted into evidence, including a letter dated August 8, 1995 from the Office of the Secretary of State Department of Police and follow-up letter dated September 7, 1995 from the Office of the Secretary of State signed by David Finnigan, Assistant Counsel. These letters are attached hereto for your convenience.

Raymond Sanchez is still serving as a Secretary of State Investigator although he is presently 67 years of age with more than 23 years active duty service.

George H. Ryan,
Secretary of State
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Also, during the Hearing there was admitted a Cease and Desist order in the case of *Department of Human Rights v. State of Illinois, Office of the Secretary of State*, 18 Ill. HRC Rep. 51, containing provisions which stated:

> "That the Respondent is ordered to cease and desist forthwith from taking any measure henceforth to compel or coerce Complainants or any others it may employ as investigators to retire because they have attained any age younger than 70 years."

Although this Cease and Desist Order was entered on August 28, 1985 by the Human Rights Commission, it is apparently still in effect. Also, in view of ADEA referred to in the letter to Investigator Sanchez dated September 7, 1995, 1 believe that I am entitled to resume my work as a Secretary of State Investigator. Based on the foregoing and the evidence offered in the Hearing, I respectfully state that I am now and have been since August 14, 1990 entitled to continue to serve as a Secretary of State Investigator and that my forced retirement was a discriminatory act against me which should be corrected at the earliest date possible.

I am physically fit and have the knowledge and experience of 23 years as an investigator. I have a good record and I am willing and able to immediately resume

my duties in the Mt. Vernon District where I was assigned for 19.5 years prior to the forced retirement. Mt. Vernon, Illinois is my home.

When reinstated, my claim for back wages, attorneys' fees, etc. can be resolved expeditiously from information I have accumulated concerning the lost earnings because of the forced retirement against my will.

May I hear from you at your early convenience.

Respectfully yours,
John D. Langley
312 Peach Street
Mt. Vernon, Illinois 62864
Home Ph: (618) 242-7522
Fax No: (618) 532-5055

APPENDIX U

ILLINOIS MOTOR VEHICLE CODE
ILL.REV.STAT. 1981, CH. 95 1/2, PAR. 2-115

2-115. Investigators

§ 2-115. Investigators. The Secretary of State, for the purpose of more effectively carrying out the provisions of the laws in relation to motor vehicles, shall have power to appoint such number of investigators as he may deem necessary. It shall be the duty of such investigators to investigate and report violations of the provisions of this Act administered by the Secretary of State and provisions of Chapters 11, 12, 13, 14 and 15 [1] and to investigate and report any violation by any person who operates as a motor carrier of property as defined in Section 18-100 of this Act and does not hold a valid certificate or permit. With respect to the enforcement of the provisions of this Act, such investigators shall have and may exercise throughout the State all of the powers of police officers.

No person may be retained in service as an investigator under this Section after he has reached 60 years of age.

APPENDIX V

ARTICLE 8A. ILLINOIS HUMAN RIGHTS COMMISSION; PROCEDURES UNDER ARTICLES 2, 4, 5, 5A and 6

Article 8A was added by P.A. 86-910, §1, eff. Sept 11, 1989.

(J) Make Complainant Whole.. Take.such action as may be necessary to make the individual complainant whole, including, but not limited to, awards of interest on the complainant's actual damages and backpay from the date of the civil rights violation.. Provided, however, that no award of prejudgment interest shall be made pursuant to this amendatory Act of 1987 with respect to any charge in which the complaint before the Commission was filed prior to December 1, 1987. With respect to all charges for which complaints were filed with the Commission prior to December 1, 1987, make whole relief shall be awarded pursuant to this subsection as it existed prior to -revision by this amendatory Act of 1987.

There shall be no distinction made under, this. Section between complaints filed by the Department 'and those filed by the aggrieved party.

Formerly§ 8-108. Renumbered§ 8A-104 and amended by P.A. 86-910,§ 1, eff. Sept. 11, -1989.

APPENDIX W

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV.

§ 1 Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CHARGE DISCRIMINATION

form is affected by the Privacy A. of 1974; see Privacy Act Statement on reve
e completing this form.

ENTER CHARGE NUMBER
☒ FEPA
☐ EEOC

STATE OF ILLINOIS, DEPARTMENT OF HUMAN RIGHTS and EEOC
(State or local Agency, if any)

NAME (Indicate Mr., Ms., or Mrs.)	HOME TELEPHONE NO. (Include Area Code)
John D. Langley	618/242-7522

STREET ADDRESS	CITY, STATE AND ZIP CODE	COUNTY
3112 Peach Street	Mt. Vernon, Illinois 62864	Jefferson

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME	NO. OF EMPLOYEES/MEMBERS	TELEPHONE NUMBER (Include Area Code)
	More than 15	217/782-7126

STREET ADDRESS	CITY, STATE AND ZIP CODE
324 West Mornoe	Springfield, Illinois 62756

NAME	TELEPHONE NUMBER (Include Area Code)

STREET ADDRESS	CITY, STATE AND ZIP CODE

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es))
☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☒ NATIONAL ORIGIN
☒ AGE ☐ RETALIATION ☐ OTHER (Specify)

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (Month, day, year)
August 14, 1990

THE PARTICULARS ARE (If additional space is needed, attached extra sheet(s)):

I. On August 14, 1990, I was discharged from my position as investigator. I was hired on November 1, 1966.

II. The reason Captain William Price, District Commander, gave for discharging me was that retirement was mandatory according to the contract between the Secretary of State and the Illinois Fraternal Order of Police.

III. I believe I have been discriminated against because of my age, 62, date of birth, August 10, 1928, in that:

A. On August 14, 1990, I was called into the District 4, Secretary of State's Office, Mt. Vernon, Illinois by Captain William Price, District Commander, and told by him that Article 29, Mandatory Retirement, in the contract between the Secretary of State and the Illinois Fraternal Order of Police was being enforced. He told me to go home and get my clothes and other state equipment ready to turn in, and that Sgt. Brad Warren would pick them up as soon as the FAX letter got down from Springfield that day to serve on me and that my service to the department would end as of the end of the shift.

B. There are other investigators in the rank in the department that are older than me.

JHA/elv

☐ I also want this charge filed with the EEOC.
I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

John D. Langley

Date 8/29/90 Charging Party (Signature)

NOTARY - (When necessary to meet State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT John D. Langley

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Day, month, and year) 8/31/90

OFFICIAL SEAL
DEBORAH K. ASHBY
Notary Public, State of Illinois
My Commission Expires 3-20-93

EEOC FORM 5 (REV. 3-31-87) PREVIOUS EDITIONS O ...TE AND MUST NOT BE USED.

APPENDIX X

BEST AVAILABLE COPY